Same sex unions at the Strasbourg Court in a divided Europe: driving forward reform or protecting the Court's authority via consensus analysis?

Key words: same sex registered partnerships, marriage, Articles 8,14,12 ECHR

Abstract:

This article considers the division in Europe on the matter of recognition and protection of same sex relationships in the form of registered partnerships or marriage, an issue of especial significance at the present time in a number of Council of Europe states. It examines the developing Strasbourg jurisprudence that has incrementally contributed to the increasing spread of such protection and recognition across Europe, with a view to arguing that within it the Court appears to be seeking to reconcile two conflicting aims. It appears to intend to continue to combat the notion that same sex and different sex couples can be treated differently in this respect by states. But it is also seeking to preserve its own authority in the face of the opposition of certain Central and Eastern European states to introduction of formal frameworks affording protection and recognition to same sex relationships. In seeking to reconcile the two aims, it has placed reliance on forms of consensus analysis in the member states, due to the link between such analysis and the grant of a wide margin of appreciation to a member state. But, as will be argued, its use of such analysis in this context has tended towards arbitrariness. Its approach therefore raises the question, explored below, whether the project it has tentatively embraced, of pushing forward the introduction of same sex registered partnerships or marriage in member states which have not introduced such measures, is advancing with particular caution to avoid undermining acceptance of the authority of the Court in such states.

Introduction

State acceptance of same sex relationships divides Europe: while a number of Western European states have introduced same sex marriage,[1] and/or civil partnerships,[2] or are about

Unless otherwise stated all URLS were last accessed 1 March 2016. My thanks are due to J Scherpe and R Wintemute for comments in July 2015 on an early draft of the paper this piece is partly based on.

[1] For a list of states that have introduced same sex marriage see note 149 below.

to do so,[3] a number of Central and Eastern ones[4] have no legislative framework for the recognition of such partnerships and have barred same sex marriage constitutionally.[5] In addressing claims for official recognition of same sex unions the Strasbourg Court has therefore found itself confronting discrimination against a sexual minority while seeking to maintain its own credibility and authority which would be threatened if it developed rights to such recognition that a number of states would be likely to greet with hostility and resistance.

The Court does not and cannot rely on coercion: it relies on member states to implement its judgments.[6] Its legitimacy in general may be viewed as having varying aspects which are not necessarily in harmony with each other; it inevitably relates to the extent to which states are observed to acquiesce in its judgments,[7] which also appear to command a measure of Europe-wide agreement. In normative terms its judgments would be expected to be reflective of

[2] For a full list see note 110 below. The term 'registered partnerships' will be used as the generally accepted generic term from this point.

[3] For states shortly to introduce same sex marriage or registered partnerships see note 151 below.

[4] The term 'Central and Eastern European' member states of the Council of Europe will be taken to include: Albania, Bulgaria, Croatia, Poland, Hungary, Moldova, Macedonia, the Czech Republic, the Slovak Republic, Slovenia, Romania, Serbia, Bosnia and Hercegovina, Estonia, Latvia, Lithuania. The member states of Georgia, Azerbaijan, Armenia, Russia, Ukraine, Turkey are listed by some authorities as European, by others as Asian. There is no clear consensus as to the states that make up Central and Eastern Europe, but for convenience the term 'Central and Eastern Europe' will be used to refer to all these member states. 'European consensus' will be taken to refer to identifying a consensus among all the Council of Europe contracting states, although it is acknowledged that including the latter group of states will tend inevitably to reduce the consensus in this context.

[5] For example, on 5 June 2014 Slovakia's Parliament amended its constitution to define marriage as a union between a man and a woman: see *Jurist* 5 June 2014 'Slovakia amends constitution to define marriage as between one man and one woman' at http://jurist.org. See note 159 below as to constitutional amendments designed to exclude same sex marriage in a number of Central and Eastern European states.

[6] Under Article 46(1) ECHR states are bound by final judgments against them, meaning that the state should take steps to implement the judgment; the Committee of Ministers supervises the implementation (Article 46(2)). But persistent resistance to the Court's judgments is already apparent in other contexts in relation, in particular, to the Ukraine and Russia. The Council of Europe Parliamentary Assembly Committee on Legal Affairs and Human Rights 'notes with concern that the prevailing challenges facing the Court, most notably the high number of repetitive applications as well as persisting human rights violations of a particularly serious nature, reveal a failure by certain High Contracting Parties to discharge their obligations under the Convention': 'The effectiveness of the European Convention on Human Rights: the Brighton Declaration and beyond' AS/Jur (2014) 33. See also the Brussels declaration 2015: 'emphasis must now be placed on the current challenges, in particular the repetitive applications resulting from the non-execution of Court judgments, the time taken by the Court to consider and decide upon potentially well-founded cases, the growing number of judgments under supervision by the Committee of Ministers and the difficulties of States Parties in executing certain judgments due to the scale, nature or cost of the problems raised' ('Implementation of the European Convention on Human Rights, our shared responsibility' 27 March 2015, at https://wcd.coe.int/ViewDoc.jsp?id=2308041&Site=CM). See further the 8th Annual Report of the Committee of Ministers (2014). See also note 17 below.

[7] This sociological aspect of the concept of legitimacy derives in part from Weber: see M. Weber, *Economy and Society 5* (1922, Jackson: University of California Press, Eng tr, 1969). See J. Bensman 'Max Weber's concept of legitimacy' in A. Vidich and R. Glassman (eds), *Conflict and Control: Challenges to Legitimacy of Modern Governments* (Beverly Hills: Sage Publications, 1979), 17-48; N. Grossman 'The Normative Legitimacy of International Courts' (2013) 86 *Temple Law Review* 61, 80, 86, 91; see also K Dzehtsiarou *European Consensus and the Legitimacy of the ECtHR* (CUP, 2015), esp chap 6.

fundamental rights in the sense that a basic, not necessarily expansive, standard of rights is maintained uniformly across member states. The standing of its judgments in Europe cannot be divorced from their normative content or from their procedural integrity, which is reliant on demonstrating reasoning processes that adhere to principles of legal certainty and are transparent, consistent, clear.[8] However, reconciling these aspects of its legitimacy with each other is problematic, especially in this context, which appears to arouse greater controversy than does addressing discrimination on grounds of sexual orientation more generally. The more that the Court relies on the interpretative method[9] to advance rights, especially in relation to social issues where there is considerable disagreement among member states as to the moral principles at stake, the less it can be assured that all the states would sustain consent to such developments,[10] leading it to rely heavily on established methods of creating self-restraint, based on the principle of enhanced subsidiarity and realised through the margin of appreciation doctrine, closely linked to European consensus-based analysis.

But reliance on finding a European consensus in socially sensitive contexts can merely lead to acceptance of detrimental treatment of groups traditionally vulnerable to discrimination, including women,[11] and sexual minorities. In the context under discussion such reliance creates, as will be argued, the danger that the Strasbourg jurisprudence will be influenced by national choices arising from prevailing discriminatory attitudes against homosexuals in certain member states.[12] In such states it is clear that a deliberate choice has been made to oppose the introduction of same sex registered partnerships and, *a fortiori*, same sex marriage, while in a number of them Constitutional guarantees of equality exclude one particular minority group – members of the LGBT community[13] (although that is not necessarily conclusive: inclusion of that group in the protection against discrimination could occur via interpretation). Against that background, reliance on identifying a consensus in Europe to push forward formal state protection for same sex unions risks undermining the

[8] It itself has emphasised those qualities in its 'prescribed by law' jurisprudence, although that jurisprudence is very far from setting a high standard. But outside that jurisprudence the standards contemplated as to the Court's own reasoning are higher: see eg *Demir v Turkey* (2009) 48 *EHRR* 54 in which the Court indicated that it should adhere to the principles of 'legal certainty, foreseeability and equality before the law' (at [153]). See further on the issue of procedural legitimacy K. Dzehtsiarou **'**Does consensus matter? Legitimacy of European consensus in the case law of the European Court of Human Rights' (2011) PL 534, 537.

[9] See for discussion G. Letsas *A Theory of Interpretation of the ECHR* (OUP, 2007) Chap 3.

[10] See further M. Kumm, 'The legitimacy of international law: a constitutionalist framework of analysis' (2004) 15 *European Journal of International Law* 907.

[11] The use of consensus analysis in *ABC v Ireland* (2011) 53 *EHRR* 13 provides the most pertinent example; see note 27 below.

[12] See notes 133 and 134 below.

[13] See note 155 below.

role of the Court in normative legitimacy terms, as the guardian of the ECHR's underlying values, including protection for minority groups against majoritarian oppression,[14] and for individual dignity.[15] Its resultant stance stands in strong contrast to that of the US Supreme Court which in a historic judgment recently found a constitutional right to same sex marriage in *Obergefell*.[16]

Clearly, the legal positions of the two courts are dissimilar: the Strasbourg Court, unlike the US Supreme Court, cannot ensure the implementation of its judgments by courts in member states, and is operating in the context of international law which respects state sovereignty, as reflected in the margin of appreciation doctrine, the position of the rights in national law, and the ECHR enforcement arrangements, based on the principle of subsidiarity.[17] But reliance on that doctrine is especially problematic in the context under discussion, as this article contends, in exploring the implications of the Court's incrementally developing jurisprudence for a number of Central and Eastern European states demonstrating varying levels of hostility towards same sex couples.[18] It considers that jurisprudence addressing claims for state recognition of same sex relationships, including marriage,[19] in order to argue that it reveals with particular force the problem of relying on identifying a consensus in relation to addressing discrimination. The Court is seeking to avoid undermining an increasingly fragile

[14] See G. Letsas *A Theory of Interpretation of the ECHR* (Oxford: OUP, 2007) 122-123 as to the potential violation of rights created by allowing communal morality to limit rights.
[15] See D. Beyleveld and R. Brownsword *Human Dignity in Bioethics and Biolaw* (Oxford: OUP, 2001), Chap 1.
[16] *Obergefell v Hodges* 576 US (2015) June 26.
[17] See notes 6 and 21. A contracting state could denounce the ECHR at any time (Article 58 ECHR) and leave the Convention system. States that object to judgments of the US Supreme Court may not secede from the USA and the Supreme Court's jurisdiction.
[18] For example, a 2013 survey by the Levada Centre found that 74% of Russians considered that society should reject homosexuals; 16% of Russians thought gay people should be isolated from society; 22% thought they should be forced to undergo treatment; 5% thought they should be 'liquidated'. A further survey from the Centre (reported 6 October 2015) found in answer to the question 'How would you feel if same sex marriage were permitted in Russia?' that 26% of respondents would react 'somewhat negatively'; 58% 'entirely negatively' (at http://www.advocate.com/society/culture/2013/08/06/74-russians-reject-homosexuality-says-survey). See also notes 133 and 134 below.
[19] This article is *not* taking the stance that marriage *per se* necessarily represents a desirable means of creating recognition of a relationship (see on this point M. Fineman *The Autonomy Myth: A Theory of Dependency* (New York: New Press, 2005)). Its stance is that marriage provides in member states a level of civic benefits, unmatched by that available in respect of cohabitation, from which same sex couples should not be automatically excluded, and that, moreover, making provision only for registered partnerships means denying same sex couples a choice a number of them would prefer to be able to make (in the UK, from the office of national statistics: 7,366 marriages were formed between same sex couples between 29 March 2014 and 30 June 2015; 7,732 couples chose to convert their existing civil partnership into a marriage between 10 December 2014 and 30 June 2015; marriages of same sex couples could be formed from 29 March 2014; from February 2014, the number of civil partnerships formed each month began to fall notably when compared with the same month a year earlier; in December 2014, only 58 civil partnerships were formed compared with 314 in December 2013, a fall of 82% (*www.ons.gov.uk*)).

acceptance in certain member states as to its role[20] on a culturally sensitive social issue, by relying on consensus analysis, but at the same time it is aiding the ongoing spread of same sex registered partnerships across the region. The discussion below explores the approach the Court has taken in seeking to reconcile the two aims in relation to same sex marriage as well as to such partnerships.

Subsidiarity-related Strasbourg mechanisms

The well-established interpretivist tradition of the Court - extending the scope of the rights by evolutive interpretation - is generally viewed as rendered palatable to member states, especially the more socially conservative ones, by reliance on subsidiarity-related devices. Their role has recently been emphasised more strongly by the Council of Europe as is apparent in respect of the pressure the Court has come under recently, especially after the Brighton and Brussels declarations,[21] to give greater recognition to a principle that may be termed that of enhanced subsidiarity, leading to a stronger affirmation of the margin of appreciation doctrine,[22] which is intricately linked to European consensus analysis.[23]

At this point elaboration is required as to the nature of consensus-based analysis. Put simplistically, identifying the existence of a consensus in Europe is often taken to denote identifying common ground between the laws of a majority of member states in relation to

[20] In particular, the Supreme Russian Court has found that the national Constitution takes precedence over the ECHR, and decisions by the European Court of Human Rights (ECtHR) should be upheld only if they do not contradict basic Russian law (see *Russia Today* 'Constitutional Court rules Russian law above European HR Court decisions,' 14 July 2015, at https://www.rt.com/politics/273523-russia-court-rights-constitution/).

[21] See the Brighton Declaration 'High Level Conference on the Future of the European Court of Human Rights' 19-20 April 2012, para 3: 'The States Parties and the Court share responsibility for realising the effective implementation of the Convention, underpinned by the fundamental principle of subsidiarity'. The Brussels declaration, 2015, n 6 above, stated that it 'Reiterates the subsidiary nature of the supervisory mechanism established by the Convention and in particular the primary role played by national authorities, namely governments, courts and parliaments, and their margin of appreciation in guaranteeing and protecting human rights at national level' *(www.echr.coe).* Protocol No. 15, adopted in May 2013 and in the process of ratification by the 47 Contracting Parties, will add references to the margin of appreciation and subsidiarity to the Preamble of the ECHR. See H. Fenwick ' Enhanced Subsidiarity and a Dialogic Approach – or Appeasement in recent cases on criminal justice, public order, counter-terrorism at Strasbourg against the UK?' in *The UK and European Human Rights: A Strained Relationship?* K Ziegler, E Wicks, L Hodson (eds) (Hart, 2015).

[22] See A. Legg *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford: OUP, 2012). See as regards subsidiarity: H. Fenwick, note 21 above. Spielmann finds that reliance on the margin of appreciation 'makes for a body of human rights law that accepts pluralism over uniformity, as long as the fundamental guarantees are effectively observed': D. Spielmann, 'Whither the margin of appreciation?'(2014) 67 *Current Legal Problems* 49, 49.

[23] See L. Wildhaber, A. Hjartarson and S. Donnelly, 'No Consensus on Consensus? The Practice of the European Court of Human Rights' (2013) 33 *Human Rights Law Journal* 248, 252.

domestic protection for particular rights,[24] tending to find that if such a consensus is identified, a narrow margin of appreciation only will tend to be conceded to the state in question, unless it can make a special case to justify its non-protection of the right.[25] If *no* consensus on an issue can be discerned, the margin will tend to remain wide, meaning that the justification put forward for failing to introduce a rights-protecting measure is not closely scrutinised, so the demands of proportionality are much more readily satisfied.[26]

But such a conventional analysis of the relationship between consensus-based analysis and the margin of appreciation doctrine would fail to capture its malleability. In practice, uncertainty arises as to every aspect of it: the decision as to whether or how far any reliance should be placed on an identified consensus or lack of one;[27] the means of determining the 'consensus',[28] and its source,[29] which has not been confined to a comparative analysis of the

[24] For a very comprehensive examination based on extensive consideration of the Court's case-law, see Wildhaber, Hjartarson and Donnelly, *ibid*. See further M. Arden *Human Rights and European Law: Building new legal orders* (Oxford: OUP, 2015) 313-315.

[25] See eg *ABC v Ireland* (2011) 53 EHRR 13 at [237].

[26] See eg *Rees v UK* (1987) 9 *EHRR* 56 at [37]; *Cossey v UK* (1991) 13 *EHRR* 622 at [234]; *Evans v UK* (2007) 43 *EHRR* 21 at [77]; *Fretté v. France* (2004) 38 *EHRR* 21 at [41]; *ABC v Ireland* (2011) 53 *EHRR* 13 at [232].

[27] Wildhaber, Hjartarson and Donnelly, note 23 above, find that 'in a sizeable number of cases the consensus factor has probably played a decisive role' (at 256). But it should be noted that very strong commonality between laws in member states does not preclude according the state a very wide margin of appreciation in the context of controversial social issues as in *ABC v Ireland* (2011) 53 *EHRR* 13 in which the availability of legal abortion in the vast majority of member states was *not* found to mean that common ground existed on the beginning of life. In stark contrast, in *Hirst v UK (no 2)* (2004) 38 *EHRR* 40 at [81], the Court found: 'even if no common European approach to the problem can be discerned, this cannot in itself be determinative of the issue'.

[28] Research identifying a consensus is conducted for the Court by its Research Division. The research deployed has been criticised for its lack of thoroughness and precision compared to the consensus-based research conducted in respect of the US Supreme Court: see J. Brauch 'The Dangerous Search for an Elusive Consensus: What the Supreme Court Should Learn from the EurCourtHR' (2009) 52 Howard LJ 277, 278, 288; for further comparison between the use of consensus analysis in the United States Supreme Court and the European Court of Human Rights, see J.L. Murray 'Consensus: concordance, or hegemony of the majority?' in A. Kovler, V. Zagrebelsky, L. Garlicki, D. Spielmann, R. Jaeger and R. Liddell (eds) *Dialogues between Judges* (Strasbourg: European Court of Human Rights, 2008).

[29] It has been based on discerning commonality between the laws of member states (as in the same sex marriage cases, below), but consensus has also been found to relate to practices in member states, common social trends or ongoing debates. For example, a wide margin of appreciation was conceded to France in *SAS v France* ECtHR 1 July 2014 on the basis that little common ground could be found amongst the member states as to the question of banning the wearing of face coverings in public since such a ban 'has been a subject of debate in a number of European States' and in some 'is still being considered' (at [156]). However, in terms of common ground as to the *law* in member states, only France and Belgium at the time in question had introduced such a ban. *ABC v Ireland* (note 11) also provides a good example of inconsistent application of consensus analysis. Soft law sources, such as reports and resolutions of the Council of Europe or the UN, have also been taken into account. For comprehensive examples of cases relying on these different methods of determining consensus see Wildhaber, Hjartarson and Donnelly, n 23 above, at 253-254 and K Dzehtsiarou *European Consensus and the Legitimacy of the ECtHR* (CUP, 2015). See also C.L. Rozakis, 'The European Judge as Comparatist', in B. Markesinis and J. Fedke, *Judicial Recourse to Foreign Law. A new source of inspiration*, (New York: Routledge-Cavendish, 2006) 338 *et seq*.

laws of member states.[30] More than one form of consensus may be referred to in a particular decision, and the precise relationship between consensus analysis and the width of the margin of appreciation conceded is by no means always clear.[31] The term 'consensus' itself, far from demanding unanimity, does not necessarily denote a clear majority, and may frequently refer to an emerging trend.[32] The choices available between relying on a restrictive model of the consensus, based on identifying a clear majority of states in favour of a particular practice enshrined in their laws, or on a more liberal one, based on identifying a trend, invite arbitrariness.[33]

The laxness, imprecision and inconsistency of the Court's consensus analysis[34] is revealed with particular clarity in the context under discussion as this article seeks to emphasise: such analysis has played a significant but, in a number of respects, arbitrary, part in the jurisprudence bearing on same sex marriage and registered partnerships. Given that the width of the margin of appreciation granted is usually linked to the level of scrutiny deployed in the proportionality analysis, the use of consensus analysis is complicated still further in relation to claims of discrimination under Article 14,[35] especially relevant in this context: if a form of consensus on the matter can be discerned, then it has been accepted under Article 14 that especially weighty reasons must be advanced,[36] justifying the measure creating differentiation if certain grounds of discrimination are at stake, including sexual orientation and gender.[37]

The role of consensus analysis in relation to Article 14 therefore arguably appears to leave the state at present with less leeway than it does in relation to Article 8 since if a consensus is found in relation to a matter falling within Article 8(1), the Court may still find that there is

[30] The 'consensus' may also relate to international law generally, to decisions of prominent Supreme Courts, usually the courts of the USA, Canada, Australia, New Zealand, Israel, South Africa: see L Wildhaber *et al* at p255 at (31), note 23 above. It may relate to a global trend, or even to an internal consensus in the state in question (see below, pp 00).
[31] See pp00 below.
[32] The uncertainty on this point has in particular been criticised by Murray, note 28 above, at 52.
[33] See *Oliari* v *and others v Italy* ECtHR 21 July 2015 at [192]; see also pp 00 below.
[34] See further T. Zwart as to lack of clarity in the Court's consensus analysis: 'More human rights than Court: why the legitimacy of the ECtHR is in need of repair and how it can be done' in *The ECtHR and its discontents* (S. Flogaitis, T. Zwart, J. Fraser eds) (2013) 71-95; see also L R. Helfer, 'Consensus, Coherence and the European Convention on Human Rights' (1993) 23 *Cornell International Law Journal* 133.
[35] Article 14 guarantees a right to freedom from discrimination in the enjoyment of the other rights.
[36] See *Karner v Austria* [2004] 38 *EHRR* 24, at [41]. In *Vrountou v Cyprus* ECtHR 13 October 2015 it was found: 'references to traditions, general assumptions or prevailing social attitudes in a particular country are insufficient justification for a difference in treatment on grounds of sex'.
[37] See *Konstantin Markin v Russia* (2012) 56 *EHRR* 8 (GC).

scope for finding that the requirements denoted by ensuring 'respect' for private or family life can vary widely, as discussed below.[38] In order to avoid reaching a particular conclusion unwelcome to a number of member states, the Court, in a number of the decisions considered below, refused to consider the claim under Article 14 at all, thereby avoiding the question of the weighty reasons justifying failures to introduce state recognition of same sex partnerships, and preferring to determine the matter instead under the banner of the varying meanings to be ascribed to the term 'respect' in Article 8(1) in relation to positive obligations. The notion of what is demanded by such respect is also affected by consensus-based analysis, but the resulting determinations have been found to leave greater latitude for varying approaches in member states.[39] Criticism levelled at reliance on the consensus doctrine in general[40] therefore has particular pertinence in this context. While 'universal agreement on the core values of the Convention system' may provide the 'most effective means of defending it',[41] the divergent views in the member states as to the acceptability of religiously and culturally-based discrimination practiced against same sex couples, means that in this context agreement on the meaning of the core value of promoting equality is not apparent.[42]

Reserving the right to marry to different sex couples

Article 12 ECHR guarantees a right to marry to 'men and women', but the right has been interpreted at Strasbourg to be inherently limited to different sex couples, even initially excluding couples who became different sex ones after the gender reassignment of one partner.[43] The Court, however, later demonstrated, once a convergence of standards on the matter in Europe was perceived, its acceptance that the wording of Article 12 is open to interpretation in finding that post-operative transsexuals have the right to marry in the new assigned gender, although *only* if reassignment would produce a marriage of different sex

[38] See pp00.
[39] See *Oliari and others v Italy* ECtHR 21 July 2015 at [161]; *Christine Goodwin v UK* (1996) 22 *EHRR* 123 at [72] and [85]. In both decisions it was found that there was a consensus that some form of legislation was necessary but in both little attempt was made to identify a consensus as to the core obligations such legislation should reflect.
[40] As Macdonald argues, reliance on consensus analysis risks forfeiting the Court's 'aspirational role by tying itself to a crude, positivist conception of "standards"': R.S. Macdonald, 'The margin of appreciation' in R. Macdonald, F. Matscher and H. Petzold (eds) *The European System for the Protection of Human Rights* (Hague: Martin Nijhoff, 1993) 124.
[41] Judge Kovler, *Dialogues Between Judges*, note 28 above, at 13 (a Russian judge).
[42] Benvenisti has pointed out that reliance on consensus could readily lead to failure to combat discrimination against minority groups: E. Benvenisti, 'Margin of Appreciation, Consensus and Universal Standards' (1999) 31 NYU J Int L & Pol 848.
[43] It had been found to refer to 'traditional marriage between persons of the opposite biological sex' (*Sheffield and Horsham v UK* (1998) 27 *EHRR* 163 at [66]).

partners.[44] The determination to confine the right to marry to such partners arose partly on the basis of the original intention underlying Article 12: the right is stated to apply to 'men and women' as opposed to the use of the neutral term 'everyone' in Article 8.[45] But even assuming that the words 'men and women' were intended to be used in an exclusionary fashion, that would not have been enough to exclude same sex couples from the scope of Article 12 since the words clearly create ambiguity:[46] they could have been taken to mean merely that only men and women as opposed to children could contract marriage, arguably reinforcing the use of the term 'of marriageable age' in the Article. Clearly, the gender neutral term 'adult' could have been used instead in Article 12, but the choice of the words 'men and women' is still not conclusive. They could have been interpreted as meaning that men could marry men or women, as could women, under an evolutive interpretation of Article 12, despite the fact that so doing would appear to depart from the original intention of the founders of the ECHR, and would not be the most apt interpretation of the words. The qualifying aspect of Article 12, to the effect that the right is subject to the national laws governing marriage,[47] is also non-determinative, since it would be assumed, and has been accepted, that national laws cannot impair the very essence of the right.[48] A breach of Article 12 read with 14 might have been expected to arise where states allowed or mandated discriminatory interferences with the right to marry.

Accepting state bars on same sex marriage under Article 12

But the Court has consistently refused to read an obligation placed on states not to bar same sex marriage into Article 12, largely on the basis of reliance on a particular model of consensus analysis. In the leading decision in *Schalk and Kopf v Austria*,[49] in which a registered partnership became available to the applicants as a same sex couple (less than two months before the Court hearing), but marriage was barred, they contended that Article 12 should, in the light of the evolution of the concept of marriage, be read as granting same sex

[44] *Christine Goodwin v UK* (1996) 22 EHRR 123 at [100]-[104]. See in comparison *Hämäläinen v Finland* [2014] *ECHR* 787 (discussed below) in which the right to maintain the marriage combined with full recognition of the new gender of one partner was denied at Strasbourg since the 'wrong' gender mix was achieved after gender reassignment.
[45] The neutral terms 'one' or 'everyone' are used in all the Articles bar Article 12.
[46] That was acknowledged in *Schalk and Kopf v Austria* (2011) 53 *EHRR* 20 at [55].
[47] The precise wording is: 'according to the national laws governing the exercise of this right'.
[48] See eg *Jalloh v Germany* (2007) 44 *EHRR* 32 at [97]; *B and L v UK* (2006) 42 *EHRR* 11 at [34]; *F v Switzerland* (1988) 10 *EHRR* 411 at [32].
[49] (2011) 53 *EHRR* 20.

couples access to marriage.[50] The Court found, outside the context of gender reassignment, that it no longer considered that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two people of different genders.[51] Thus, having taken the step previously of finding that the birth gender of one member of a married couple was not necessarily determinative of the applicability of Article 12 if that gender had been reassigned to create a different sex couple, it contemplated the further step of finding that two persons of the *same* gender could fall within its scope.[52] In so finding the Court took account of Article 9 of the EU Charter of Fundamental Rights[53] which, as the Court had noted in *Goodwin,*[54] had deliberately dropped the reference to 'men and women'. But it also noted that by referring to national law, Article 9 of the Charter had left the decision whether or not to allow same sex marriage to the member states,[55] and thereby had left leeway for the Strasbourg Court to resist the claim.

Rather than merely relying on the words 'men and women' in Article 12, as it had previously done, or simply on the specific national law governing marriage, it found that marriage has 'deep-rooted social and cultural connotations which may differ largely from one society to another',[56] and in finding no breach of Article 12, the Court proceeded to rely on numerically-based comparative consensus analysis to find that a particularly wide margin of appreciation should be accorded to Austria, given that only six out of forty-seven Council of Europe States allowed same sex marriage at the time.[57] So the decision whether to allow same sex couples access to marriage was found to remain a matter for the national laws of contracting member states within a wide margin of appreciation. The tone adopted by the Grand Chamber in *Hämäläinen v Finland*[58] in relation to Article 12 was even less propitious

[50] *Ibid* at [44].
[51] *Ibid* at [61]; it found: 'the Court 'no longer consider[s] that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex'.
[52] Had it done so that would clearly also have benefited couples wishing to marry who became same sex after the gender reassignment of one member of the couple: see *Hämäläinen v Finland* [2014] *ECHR* 787, below pp 00.
[53] The Court noted in *Schalk and Kopf* (2011) 53 *EHRR* 20 at [24]-[26], that the Commentary of the Charter, which became legally binding in December 2009, had confirmed that Article 9 is meant to be broader in scope than the corresponding Articles in other human rights instruments: Charter of the Fundamental Rights of the European Union (2000/C 364/01).
[54] *Goodwin v UK* (2002) 35 *EHRR* 447 at [100].
[55] In *Schalk and Kopf v Austria* (2011) 53 *EHRR* 20 the Court referred to the words of the Commentary, at [25]: '... it may be argued that there is no obstacle to recognise same-sex relationships in the context of marriage. There is, however, no explicit requirement that domestic laws should facilitate such marriages.'
[56] *Ibid* [61].
[57] *Ibid* [58].
[58] [2014] *ECHR* 787.

in the sense of indicating a willingness to reopen the question once the European consensus on same sex marriage had strengthened. The case concerned a married couple whose marriage pre-dated the gender reassignment of one member of the couple. Confirmation of the applicant's status as a female required under the Finnish legislation that her spouse had given consent to the conversion of their marriage (viewed by a majority of the Court as having become a same sex marriage) into a registered partnership, but both partners were strongly opposed to such conversion on the grounds of religious belief. She claimed under Article 12 read with 14 that she should be able to remain married with full recognition of her new gender, regardless of the fact that the marriage would no longer be one between different sex partners.

The Court refused to consider the case separately under Article 12, merely reiterating its finding in *Schalk and Kopf* that the Article could not be construed as imposing an obligation on the Contracting States to grant access to marriage to same sex couples.[59] That stance was reaffirmed, but even more strongly, in *Oliari and others v Italy*,[60] a case brought by three same sex couples who could not fall back on entering a registered partnership since no such option was open to them in Italy. They argued, as did the applicants in *Obergefell*, that denying them access to marriage meant that they were marginalised and stigmatised as part of a sexual minority.[61] The Court noted that since *Schalk and Kopf* there had been a 'gradual evolution' of the consensus[62] on the matter since eleven member states had introduced same sex marriage by mid-2015. But the Court clearly considered that such evolution did not change its stance on the European consensus, which was found to mean, without referring to states' margin of appreciation, that Article 12 did not impose an obligation on the respondent Government to grant same sex couples access to marriage.[63] Not only was the Article 12 claim rapidly dismissed, it was found to be inadmissible as manifestly ill-founded – a clear signal to the member states that since *Schalk and Kopf* the Court has become *more*, not less, opposed to recognising a right of same sex couples to marry at the *present* time, despite the evolution on the matter occurring in Europe.

[59] *Ibid* [96]. For discussion see P. Johnson '"The choice of wording must be regarded as deliberate": same-sex marriage and Article 12 of the European Convention on Human Rights' (2015) 40(2) European Law Review 207-224, and *Homosexuality and the ECtHR* (2013), at 151-160.
[60] ECtHR 21 July 2015.
[61] *Ibid* [190].
[62] *Ibid* [192].
[63] *Ibid* [192].

Rejecting a right to same sex marriage deriving from Articles 8 and 14

Arguments were also raised by the applicants in *Schalk and Kopf* and *Hämäläinen* to the effect that a right to same sex marriage could be derived from Article 8 read with 14.[64] When the Court in *Schalk and Kopf* turned to the question of recognising such a right, it reiterated the established acceptance that differences created within the scope of Article 8 by the state based on sexual orientation require a serious justification under Article 14. But on the basis of the concession considered above of a wide margin of appreciation to the state, due to lack of consensus as to acceptance of same sex marriage in Europe, the Court did not scrutinise the justification for excluding same sex couples from marriage. It merely found that Article 14 taken in conjunction with Article 8, a provision of more general purpose and scope than Article 12, could not be interpreted as imposing such an obligation either.[65] The similar argument in *Hämäläinen* was also dismissed briefly on the basis that the applicant's situation and the situations of persons born into their current gender were viewed as insufficiently similar to be compared with each other,[66] although no reasons were given for that finding, meaning that the Article 14 claim failed at the first stage. The majority judges characterised the claim as one involving the imposition of positive obligations under Article 8[67] on the state to secure the right to effective respect for citizens' physical and psychological integrity. Since it again found no European consensus on allowing same sex marriages,[68] it was determined that the margin of appreciation to be afforded to Finland would remain a wide one, and that Finland had not over-stepped it.[69]

Failing to perceive discrimination

The applicants in *Oliari* did not argue for a right to marry under Article 8 read with 14 but sought to rely on Article 12 read with 14; that claim was also dismissed briefly on the basis

[64] Article 8 guarantees a right to respect for private and family life, and the home, qualified in Article 8(2).
[65] *Ibid* [101].
[66] *Ibid* [111].
[67] It reiterated that such obligations had been accepted as arising under Article 8 in: *Nitecki v Poland* ECtHR 21 March 2002; *Sentges v Netherlands* ECtHR 8 July 2003; *Odièvre v France* (2004) 38 *EHRR* 43; *Glass v UK* [2004] 1 FCR 553 at [74]-[83]; and *Pentiacova and Others v Moldova* (2005) (admissibility decision) 40 *EHRR* SE23.
[68] *Hämäläinen v Finland* [2014] *ECHR* 787 at [73]-[74]. That lack of consensus would have been non-determinative following the reasoning of the Dissenting Opinion which argued for a 'trans exception' to the ban on same sex marriage on the basis that the state should differentiate between the applicant's situation and that of a homosexual couple (para 20 of the Opinion); the majority did not accept that possibility (para 70).
[69] *Ibid* [67]; the Grand Chamber referred to its judgment in *X, Y and Z v UK* ECtHR 22 April 1997 at [44].

that if in *Schalk and Kopf* a right to same sex marriage could not be derived from Article 8 read with 14 on the basis of its more general purpose, the same could be said under Articles 12 and 14. That analogy was not substantiated, and appeared to confuse the scope of Article 8 with that of Article 14. The point raised by the applicants in *Oliari* was that there should be no discrimination in the exercise of a specific right, the right to marry, an argument that could readily be distinguished from seeking to derive that right from a general right to non-discrimination in according respect to family life. Nevertheless, the Court not only relied on that doubtful analogy, but dismissed that part of the claim also as manifestly ill-founded, exhibiting a particularly clear failure to follow a transparent reasoning process.

The applicants in both *Schalk and Kopf* and *Hämäläinen* raised the issue of differences between a marriage and a registered partnership, arguing that such partnerships did not provide the same level of civic benefits and recognition as did marriage. That argument was rejected on the basis that in both member states registered partnerships offered an acceptable level of protection which was found to be within the states' margin of appreciation. The refusal to allow the applicant both full recognition of her new gender *and* maintenance of her marriage was found to be justified in *Hämäläinen*: the differences between a marriage and a registered partnership were found not to be such as to involve an *essential* change in the applicant's legal situation.[70] She would have, it was found, broadly the same legal protection under a registered partnership as was afforded by marriage. The Grand Chamber therefore concluded that the demands of proportionality and of 'fair balance' were satisfied under Article 8(2).[71]

Arbitrary use of consensus analysis

A clear movement in *Oliari* away from the Strasbourg stance in *Schalk and Kopf*, which implied that there was a certain receptivity to recognising same sex marriage in future under Article 12, is apparent. *Schalk and Kopf* appeared to open the way to recognition of a right to same sex marriage under Article 12 in future.[72] Given that in *Hämäläinen* and *Oliari* the Court merely relied on *Schalk and Kopf* in refusing to give consideration to the question of the application of Article 12 to same sex couples, *Schalk* remains the authoritative decision,

[70] *Hämäläinen v Finland* [2014] *ECHR* 787 at [83].
[71] *Ibid* [88].
[72] *Schalk and Kopf* at [61].

but the decisions taken together indicate that there is a mounting reluctance at Strasbourg to confront the application of Article 12 to same sex marriage at present, a reluctance which its choice of model of consensus analysis has obscured to an extent.

The finding in *Oliari* that the Article 12 claim was inadmissible *despite* the movement towards a consensus on same sex marriage that had occurred since *Schalk and Kopf*, indicated that the Court had in effect made a policy decision not to jeopardise its own position by espousing same sex marriage, in contrast to the stance of the US Supreme Court,[73] and was seeking as far as possible to deter future same sex couple claimants from bringing claims under Article 12 *until* the consensus had strengthened further. Its refusal to rely on a *trend* as a form of consensus may also have been intended to indicate that it was offering in effect a political *quid pro quo* to a number of governments, given that the Court did find a breach of Article 8, as discussed below, in respect of the lack of a registered partnership scheme for same sex couples. Reliance on that model of the consensus under Article 12 means that its approach can be contrasted with other decisions in the context of same sex unions which have relied on discerning a trend alone where an intimate aspect of private life is at stake.[74] *Vallianatos v Greece*[75] in particular relied on identifying a trend towards introducing same sex registered partnerships, while in *X and others v Austria*[76] the majority found that there had been a breach of Article 8 read with 14 due to the state's refusal to allow second parent adoption where that parent was in a same sex relationship, relying as a basis for comparison only on the ten Council of Europe member States which allowed second-parent adoption in unmarried couples. The dissenters considered that the majority had overstepped the limits of evolutive interpretation.[77]

As a result of its choice of model of consensus analysis in these decisions the Court avoided considering why national laws excluding adults from marriage on the basis of a protected

[73] See *Obergefell v Hodges* 576 US (2015) June 26 at 28: 'There is dignity in the bond between two men or two women who seek to marry…Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions.'
[74] The joint dissenting Opinions in *Hämäläinen*, relying on *SH and others v Austria* (2011), 52 *EHRR* 6 found at [94]: 'the existence of a consensus is not the only factor that influences the width of the State's margin of appreciation: that same margin is restricted where "…a particularly important facet of an individual's existence or identity is at stake"'. See also in a different context the comments of the Court in *Goodwin v UK* (2002) 35 *EHRR* 447 at [85]; in *Goodwin* itself a clear consensus was apparent, at least with regard to Article 8, and a thin majority in relation to Article 12.
[75] (2014) 59 *EHRR* 12.
[76] (2013) 57 *EHRR* 14.
[77] See the joint partly dissenting opinions of Judges Casadevall, Ziemele, Kovler, Jočienė, Šikuta, De Gaetano and Sicilianos.

characteristic[78] were not viewed as impairing the very essence of the right,[79] despite its previous findings to the effect that the discretion accorded to states as to the nature of their national laws on marriage could not go so far as to impair that essence. The discussion in *Oliari*, which gave an appearance of specifically confronting the issue of discrimination under Article 12 read with 14, in fact failed even more signally than had the findings in the previous two decisions to acknowledge the discriminatory impact of the policy against same sex marriage in Italy.[80] As mentioned, a number of Central and Eastern European states appear to be adamantly opposed to the introduction of same sex marriage, and in a number of instances it is constitutionally barred.[81] In an apparent effort to avoid confronting the problems the stance of those states create in terms of maintaining its own authority, while still encouraging states to provide a measure of protection for same sex couples, the Court has made some tentative moves towards accepting a right to a registered partnership rather than marriage under Article 8, either read with Article 14, or alone, the issue to which this article now turns.

Recognition of same sex partnerships as 'families' under Article 8

Before the question of state formalisation of their unions could be considered, it was necessary for the Court to recognise same sex partners as 'families' under Article 8(1). In contrast to different sex unmarried partners,[82] same sex partners did not receive such recognition until recently. But as same sex couples in Europe increasingly sought recognition and protection of their relationships, a number of them turned to Article 8 read with Article 14 at Strasbourg, arguing that the state is under an obligation stemming from Article 14 to avoid discrimination within the scope of respect for family life under Article 8(1). The decision in *Karner* relied on Article 14 read with 8 to find that same sex couples have a right to respect for their home, on the basis that the state had failed to show under Article 14 that it was necessary in order to achieve the aim of protecting the traditional family to exclude same

[78] As mentioned (see note 37 above) differentiation on certain protected grounds, which include sexual orientation, requires particularly weighty justification under Article 14: see *Karner v Austria* (note 36) at [41]; *Hämäläinen v Finland* [2014] ECHR 787 at [109]; *Smith and Grady v UK* (1999) 29 *EHRR* 493 at [89], [94].
[79] In *Schalk and Kopf v Austria* (2011) 53 *EHRR* 20 at [51] the Court merely adverted to the attachment to the 'traditional concept of marriage' as underpinning Article 12.
[80] *Oliari v Italy* ECtHR 21 July 2015 at [189], [192]-[194].
[81] See note 159.
[82] See *X and Y v UK* Eur Com 3 May 1983.

sex couples from such protection under the Austrian Rent Act.[83] *Karner* thus aided in paving the way for the significant decision in *Schalk and Kopf* which, while refusing to find a breach of Article 12, as discussed, recognised same sex couples as 'families' under Article 8(1) for the first time.

The Court noted in *Schalk and Kopf* that so far its case-law under Article 8 had only accepted that the 'emotional and sexual relationship' of a same-sex couple constitutes '*private* life', but it had not found that it would constitute 'family life'.[84] But given that recently a rapid evolution of social attitudes towards same sex couples and of the concept of 'family' in member states had occurred, and bearing certain EU Directives relating to the family in mind, the Court found that the 'relationship of the applicants, as a cohabiting same sex couple living in a stable *de facto* partnership, falls within the notion of 'family life', just as the relationship of a different-sex couple in the same situation would'.[85] So it found that the applicant couple was in a relevantly similar situation to a different-sex couple as regards their need for 'legal recognition and protection of their relationship.'[86] *Schalk and Kopf* therefore opened the door to imposing a duty on Council of Europe member states to provide *some* protection for the family life of same sex couples under Article 8 read with 14, paving the way for the later decision in *Oliari*.

An ECHR right to access a same sex registered partnership?

The jurisprudence considered reflects and forms part of the pressure to introduce state recognition for same sex relationships emanating from international human rights law more generally. In particular, a 2015 UN Human Rights Report made a number of recommendations to national governments on LGBT rights, including a recommendation to legally recognize same sex relationships.[87] Under EU law the core principle of freedom of movement may be undermined if there is a failure to maintain the rights granted to a same sex couple in one state if they move to another EU state,[88] regardless of local laws. The

[83] *Karner v Austria* [2004] 38 *EHRR* 24, at [41]. See also *Kozak v Poland* Application no 13102/02, judgment of 2 March 2010 which applied *Karner* to a similar housing tenancy situation in Poland.
[84] *Schalk and Kopf v Austria* (2011) 53 *EHRR* 20 at [90].
[85] *Ibid* at [94]. The Court referenced (para 26) Directive 2004/38/EC of the European Parliament and Council of 29 April 2004, Article 2 and European Council Directive 2003/86/EC of 22 September 2003, Article 4.
[86] *Ibid* at [99]. That was confirmed by the Grand Chamber in *X v Austria* (2013) 57 EHRR.
[87] UN Human Rights Office Report (OHCHR) (A/HRC/29/23).
[88] This view was put forward recently by Frans Timmermans, the Vice President of the European Commission; (see *the Telegraph* 30 June 2015, report by M Holehouse from Brussels). The problem as regards freedom of

Council of Europe has also encouraged states to introduce a statutory framework providing recognition and protection for same sex relationships: a 2010 resolution of the Parliamentary Assembly of the Council of Europe recognized the importance of granting same sex couples the same rights as different sex couples in civil unions or registered partnerships.[89] Partly on that basis, in 2014 the Council of Europe's advisory body – the European Commission for Democracy through Law – criticized the scope of an amendment proposed by Macedonia to its Constitution barring same sex couples from entering registered partnerships,[90] on the grounds that 'it should not exclude providing to same-sex couples the same level of legal recognition as it provides to different-sex couples.' The other part of the amendment, barring same sex marriage, was not subject to the same criticism, on the basis of the decisions in *Schalk and Kopf* and *Hämäläinen*.

That general encouragement to introduce same sex registered partnerships, combined with the current determination at Strasbourg to avoid finding a breach of Article 12 in respect of state bars on same sex *marriage*, appears to have fuelled an acceptance instead of a movement towards declaring a right to a registered partnership under Article 8 alone or read with 14, currently culminating in the decision in *Oliari*. It was clearly unnecessary to declare such a right in *Schalk and Kopf* and *Hämäläinen* on the facts, but the Court addressed that point expressly in *Schalk and Kopf*, finding that since the applicants could enter such a partnership the majority found no need to decide that lack of any means of state recognition and protection for same sex couples in the form of a specific statutory framework would create a

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movement clearly does not affect Council of Europe states not yet members of the EU, so it most obviously affects Bulgaria, Romania, Lithuania, Poland, the Slovak Republic and Latvia (and at present Italy) as EU member states since they do not recognise same sex unions. It also affects EU states that provide forms of registered partnership affording significantly less protection than marriage in comparison with 'stronger' forms; Germany's registered partnership scheme, for example, provides considerably more protection for same sex couples than does France's Civil Solidarity Pact scheme. So a same sex couple in a German registered partnership would be disadvantaged if they moved to France. See further on these points *Confronting Homophobia in Europe: Social and Legal Perspectives* L. Trappolin, A. Gasparini, R. Wintemute (eds) (Bloomsbury Publishing, 2011). This issue from the perspective of Articles 8 and 12 ECHR is likely to come before the Strasbourg Court soon: *Orlandi v Italy* (App no 26431/12) concerns lack of Italian recognition of a same sex union contracted in another state. Two of the couples concerned had contracted marriages in EU member states in which same sex marriage was legal, but Italy had refused to recognise their marriages, leading to various forms of civic disadvantage. The other couples raise the issue of recognition in Italy of marriages conducted in a non-EU member state. All the applicants complain that they are being discriminated against, in ECHR terms on the basis of their sexual orientation. They complain specifically about the authorities' refusal to register their marriage contracted abroad and more generally about the impossibility of obtaining recognition of their relationships in Italy. They invoke Articles 8, 12 and 14.

[89] Recommendation CM/Rec(2010)5.

[90] Draft Amendment XXXIII to the Macedonian Constitution introduced a constitutional definition of marriage as a union solely between a woman and a man. It also introduced a constitutional definition of 'registered cohabitation' or any other form of 'registered life partnership' as a 'life union solely between one woman and one man': Strasbourg, 13 October 2014 Opinion N° 779 / 2014 CDL-AD(2014)026, Or. Eng., para 98(a).

violation of Article 8 read with 14.[91] Following that significant finding in *Schalk*, it was always probable that the Court would be confronted with claims that a breach of Article 8 alone or read with 14 would arise if a state did not provide same sex couples with *any* framework providing such protection.

Discriminatory exclusion from an existing registered partnership scheme

A statutory framework creating registered partnerships can provide state recognition and protection of a relationship which includes defining the rights and responsibilities of the couple on a range of matters, including: property; access to pension rights; inheritance; in relation to children. Not only is civic disadvantage clearly suffered by same sex couples who cannot access any form of statutory framework offering civic benefits broadly comparable to those offered by contracting marriage, but the dignity of homosexuals as a group is assailed if the choice of such recognition is denied.[92] The question of the duty of a state to allow same sex couples access to a form of registered partnership where they were *excluded* from that scheme and also from accessing marriage – was raised in *Vallianatos v Greece.*[93] Obviously the couples in *Vallianatos* were in a situation of greater disadvantage than that of the couple in *Schalk and Kopf*, who could access a registered partnership: Greece had introduced civil unions, but they were designed only for different sex couples. The applicant couples, who were in stable same sex relationships, challenged their exclusion from such unions under Article 8 read with 14. The Court found that the applicants' relationships would fall within the notions of both 'private' and 'family' life under Article 8(1), and found that Article 14 applied[94] since the applicants were in a comparable situation to different sex couples as regards 'their need for legal recognition and protection of their relationship' – as established in *Schalk and Kopf.*[95] The Court also gave a brief nod to the dignity-based argument in finding that formal civil unions have an 'intrinsic value' for persons in the applicants' position, even regardless of the legal effects they produce.[96]

The law in Greece clearly created a difference in treatment based on the sexual orientation of the persons concerned, and the Court was not convinced by the aim of the policy, of

[91] *Schalk and Kopf v Austria* (2011) 53 *EHRR* 20 at [103].
[92] See the discussion of this point in *Obergefell v Hodges* 576 US (2015) June 26, note 73 above. See also note 19 as to the issue of choice of marriage as the means of formalising the relationship.
[93] (2014) 59 *EHRR* 12.
[94] *Ibid* [73] and [74].
[95] *Ibid* [78]; see the findings in *Schalk and Kopf* (2011) 53 *EHRR* 20 at [99].
[96] *Ibid* [81]. That point was reiterated in *Oliari v Italy* ECtHR 21 July 2015: see text to note 115 below.

protecting the family in the traditional sense, terming it 'rather abstract'.[97] Its analysis of the European consensus found that an evolving or 'minority' consensus was currently emerging with regard to the introduction of forms of legal recognition of same sex relationships, in the sense that where contracting states did authorise a form of registered partnership other than marriage only two states had reserved it exclusively to different-sex couples.[98] On the other hand, such partnerships were not yet established in the majority of states. Nevertheless, in assessing the proportionality of the means chosen with the aims pursued, the Court conceded a narrow margin of appreciation only to the state, given that the differentiation in question was based on sexual orientation. On that basis proportionality demands under Article 14 were not found to require merely that the measure chosen was in principle suitable to achieve the aim in question: it also had to be shown to be necessary to achieve that aim to exclude same sex couples from the category of civil unions.

On that basis the Court found that the government's arguments failed to justify the difference in treatment arising out of the legislation in question between same sex and different sex couples. So a violation of Article 14 read with 8 was found, meaning that in general failure to provide same sex couples with access to an *existing* registered partnership scheme in a state, combined with the non-availability of marriage, potentially places a state in violation of the ECHR on the ground that among the choices available to a state in terms of protecting relationships, provision of *no* formal recognition has a disproportionately adverse impact on applicants. The decision in *Hämäläinen* offers some indirect support to that contention since the key point that emerges is that had *no* registered partnership been available as an alternative to marriage, Finland would probably have been found, possibly even under less strict scrutiny, to have breached Article 8 on grounds of disproportionality, on the basis that the applicant would have been in a position whereby she could obtain *no* state recognition of her relationship, while at the same time achieving full confirmation of her post-operative gender. Since in *Hämäläinen* a formalised union was available to the couple in question, the demands of proportionality were found to be satisfied.[99]

[97] *Ibid* [84]. That point had previously been made in *Karner v Austria* at [41].
[98] *Ibid* [91] and [92]. 19 states (the minority) at that point had introduced such forms of registered partnership.
[99] That also may have been the basis (no reasons were given) for declaring the application in *Ferguson & Ors v United Kingdom* (App no 8254/11), the 'Equal Love' case, inadmissible: the heterosexual couples involved could access marriage; the homosexual couples could access civil partnerships. The couples wanted to have the choice of accessing either marriage or a civil partnership, rather than being confined to one form of state recognition of the relationship, based on their sexual orientation.

Lack of access to any form of same sex registered partnership

That stance, in relation to providing access to an existing partnership scheme, indicated that disproportionality might also arise where no such scheme was available, the situation that arose in *Oliari and others v Italy*.[100] The Court was confronted with a situation resembling that in *Vallianatos* but in which no registered partnership scheme had been introduced, even for different sex couples. The only form of state recognition of relationships available in Italy offering legal recognition and civic benefits targeted at couples was marriage, from which same sex couples were excluded. The Court had to determine whether Italy had therefore failed to comply with a positive obligation to ensure respect for the applicants' private and family life, in particular through the provision of a legal framework allowing them to have their relationships recognised and protected under domestic law. The protection related, the Court found, to central, not peripheral, needs of the applicants.[101]

The Court viewed the notion of 'respect' for private and family life under Article 8(1) as a flexible one, especially in relation to the imposition of a positive obligation to introduce a new legislative framework. It found that, having regard to the diversity of the practices followed in the member states, the requirements denoted by the term 'respect' would vary considerably from case to case. But it identified certain relevant factors which would in principle relate to the assessment: 'the impact on an applicant of a situation where there is discordance between social reality and the law', and the nature of the relevant administrative and legal practices within the domestic system.[102] The Court found that the current available protection in Italy for same sex couples in the form of 'cohabitation agreements' did not provide for the core needs of a couple in a stable, committed relationship, and also that such agreements were designed only to provide certain rights to people who lived together, including flatmates, and were not intended explicitly to provide any legal rights aimed at couples.[103] Recognition of same sex unions was available but only in a minority of existing municipalities,[104] and was in any event only of symbolic value. Also those arrangements were not deemed to be sufficiently stable, partly due to the nature of the judicial approach in Italy, which meant that couples seeking the protection of the courts would be dealt with on a case

[100] *Oliari and others v Italy* ECtHR 21 July 2015. The claim was brought by three same sex couples under Article 8 read alone or with 14 (as well as the Articles 12 and 14 claim considered above).
[101] *Ibid* [169].
[102] *Ibid* [161].
[103] *Ibid* [169].
[104] *Ibid* [168]: the registration of unions was available in less than 2% of existing municipalities.

by case basis only, creating uncertainty.[105] The Italian courts had found on such a basis that same sex unions should be protected as a form of social community under article 2 of the Italian Constitution, but that it was the role of the legislature to introduce a form of legal partnership covering such couples, not of the judiciary. The Court further found in relation to Italy's positive obligations under Article 8 that there was 'a conflict between the social reality of the applicants, who for the most part live their relationship openly in Italy, and the law, which gives them no official recognition'.[106] The detrimental impact on the applicant couples was viewed by the Court as 'momentous'.[107]

The Court reiterated that where a particularly important facet of an individual's existence or identity was at stake the margin of appreciation conceded to the state in question would be restricted,[108] but where there was no consensus within the member states as to the 'relative importance' of such a facet or as to the most effective method of protecting it, especially where 'sensitive moral or ethical issues' were at stake, the margin would be wider.[109] In terms of consensus analysis, the Court, in a somewhat opaque paragraph, referred to a 'thin majority' of member states (twenty-four out of forty-seven) that had by 2015 already legislated to introduce forms of same sex registered partnership;[110] it also referred to the global trend towards such introduction.[111] Displaying a degree of boldness, the Court did *not* find that since no *strong* consensus on the availability of registered partnerships was apparent in the member states, a wide margin of appreciation should be conceded to the state. Had it done so that would have meant that the reasons for Italy's failure to satisfy its positive obligations would not have been closely scrutinised. The Court could have waited for a *stronger* consensus in order to find a violation in respect of a failure by a state to introduce a same sex registered partnership scheme. The finding on consensus influenced the Court's margin of appreciation analysis, but the *precise* impact of the consensus was not articulated:

[105] *Ibid* [170].
[106] *Ibid* [173]. An Italian Bill establishing same sex civil unions was approved by the senate's Judiciary Committee on 26 March 2015, but then stalled at the Committee stage.
[107] *Ibid* [185].
[108] Citing *X and Y v Netherlands* (1985) 8 *EHRR* 235 at [24] and [27]; *Christine Goodwin v UK* (1996) 22 *EHRR* 123 at [90]; see also *Pretty v UK* (2002) 35 *EHRR* 1 at [71].
[109] *Oliari and others v Italy* ECtHR 21 July 2015 at [162].
[110] 18 member states (Andorra, Austria, Belgium, Croatia, the Czech Republic, Finland, France, Germany, Hungary, Ireland, Liechtenstein, Luxembourg, Malta, the Netherlands, Slovenia, Spain, Switzerland and the United Kingdom) authorise some form of registered partnership for same-sex couples. Portugal does not have an official form of civil union, but the law recognises *de facto* civil unions, which have automatic effect. Denmark, Norway, Sweden and Iceland used to provide for registered partnerships in the case of same-sex unions, but they were abolished in favour of same-sex marriage. In 2014 Estonia also legally recognised same-sex unions by enacting the Registered Partnership Act, which entered into force on 1 January 2016.
[111] *Oliari v Italy*, note 109 above, at [178].

it can only be assumed that there was an implicit acceptance that since an emerging European and global consensus on the matter was apparent, the margin conceded to Italy should be narrow.

In considering any justification for the failure to introduce a specific legal framework covering same sex couples, the Court noted that the Italian Government had failed to highlight explicitly what, in its view, corresponded to the interests of the community as a whole, which might have had to be balanced against the rights of the couples in question. The Italian government strongly denied that the absence of such a framework was intended to protect the traditional concept of family, or the morals of society under Article 8(2). It argued instead that time was needed to achieve a 'gradual maturation of a common view of the national community' in recognising 'this new form of family',[112] and referred to varying views on this very sensitive social issue which it viewed itself as best placed to address.[113] So it merely relied on its margin of appreciation as regards the choice of timing and the nature of the framework to be introduced. But the Court impliedly found that the margin would not cover the position, given that the Italian Constitutional Court had repeatedly called for a juridical recognition of the relevant rights and duties of homosexual unions, but the government had not responded;[114] thus it concluded that the Italian government had overstepped its margin of appreciation and failed to fulfil the positive obligation in question.

If the Court has now therefore recognised, albeit tentatively, a right to a registered partnership for same sex couples, the *content* of such a right requires some consideration. *Oliari* had very little to say on what the scope of a right to a registered partnership under Article 8 would entail in terms of the level of civic benefits and of recognition it would need to deliver. As understood at Strasbourg in the jurisprudence considered, especially *Hämäläinen*, it appears to be a right to official recognition of the relationship that provides a certain level of protection for it in terms of enjoying civic benefits (in relation, in particular, to pension rights, housing tenancy rights, inheritance). The Court in *Oliari* merely spoke of 'the core rights relevant to a couple in a stable and committed relationship' and found 'such civil partnerships have an intrinsic value for persons in the applicants' position, irrespective of the

[112] *Ibid* [176].
[113] *Ibid* [176].
[114] *Ibid* [185].

legal effects, *however narrow or extensive*, that they would produce'.[115] Thus if the level attained by a particular legal framework were to be significantly different from that available under a marriage, or if a same sex couple moved from one member state to another offering a lower level of benefits, then it is not clearly apparent at present that Article 8, possibly read with 14, would be breached, despite the fact that the detriment would arise on grounds of sexual orientation. It appears that until the consensus on the need for comparability between registered partnerships and marriage strengthens, the level of benefits under the current Strasbourg approach could depart quite significantly from those available via marriage.[116]

An Article 8 right to a same sex registered partnership?

While a right to a registered partnership for same sex unions under Article 8 was declared in *Oliari*, its scope was accorded fluidity by reference to two key factors specific to Italy: a discordance between the law and the social acceptance of same sex partnerships, and the unheeded attempts of the highest judicial authorities to persuade the legislature of the need for state recognition and protection of such partnerships. Reference to those factors could be taken to imply that the demands of respect for the family life of same sex couples, in terms of requiring the introduction of a registered partnership scheme, would bear some relation to the presence of those factors in a particular state. That stance stands in contrast to the one taken in *Vallianatos* since in that instance (unsurprisingly) no such factors were referred to in respect of imposing a positive obligation to end the exclusion of such couples from an *existing* scheme. The first factor in particular relates in effect to identifying an internal consensus on this issue in Italy. Thus in effect three forms of consensus analysis were referred to as influencing the *Oliari* judgment, and the need for a consensus in a single state could potentially counter the impact the other two forms could have in future as the European and global consensus on provision of specific legal frameworks for same sex unions

[115] *Ibid* [174], emphasis added. The Court referred to *Vallianatos*, note 93 above, at [81].

[116] That was made clearer in *Schalk and Kopf* (2011) 53 *EHRR* 20 at [108]: the Court found in relation to certain differences between registered partnerships in Austria, and marriage, that the state was within its margin of appreciation under Article 14 read with Article 8 in determining the precise nature of the formalisation of relationships represented by the partnerships in relation to the civic benefits conferred on same sex couples. The registered partnership scheme did not need to correspond to marriage in each and every respect. Similarly, a state that had introduced such a scheme would be likely to be found to be within its margin of appreciation as regards the *timing* of its introduction (*Schalk and Kopf*, at [105]; 3 of the 7 judges dissented from this view and took a harder line on timing, finding that failure to bring into force a registered partnership law sooner than 1st Jan 2010 had created a violation of Article 14 read with 8). For consideration in detail of the different forms of legal recognition of same sex relationships in a number of Western European states, see J. Scherpe 'The legal recognition of same sex couples in Europe and the role of the ECtHR' (2013) *The Equal Rights Review* 83, 83-87.

continues to strengthen.[117] One possible underlying explanation of that reluctance to commit the majority to acceptance of a right to a registered partnership under Article 8, it is contended, may have been concern as to the reception of such a right in certain Eastern and Central European member states, given their stances as to registered partnerships and same sex marriage.[118]

It may be noted that the concurring Opinion in *Oliari* was even more determined than the majority one to avoid finding that a right to a same sex registered partnership had been declared.[119] The Opinion found that the only basis for the decision was the involvement of the state in relation to the situation of the couple: 'the Italian State has chosen, through its highest courts, notably the Constitutional Court, to declare that two people of the same sex living in stable cohabitation are invested by the Italian Constitution with a fundamental right to obtain juridical recognition of the relevant rights and duties attaching to their union'. Thus, it relied on the Italian approach to the legal recognition of same sex partnerships, not the ECHR one, and made it clear that the minority judges' reasoning would apply only to Italy, not to the other twenty-two states without a specific legal framework for same sex couples.

Re-envisaging consensus analysis in this context

Oliari reveals with particular clarity that the choice of model of consensus being relied on, and its relation to the issues before the Court, requires clarification in general. But the departure from the recognised models of consensus analysis arguably implicit in placing reliance in effect on a consensus discerned in a single state is especially problematic. It is argued that instead the Court, in a social context of this nature, could take account of such acceptance in broadly comparable states, as a significant, but *not* solely determinative, aspect of the general European consensus. Since this issue relates to a division between Western European states and a number of Central and Eastern European states, the varying intensity of trends towards the consolidation of democracy and of the values of tolerance and acceptance of diversity in the latter group of states renders reliance on comparability particularly pertinent. Clearly, placing some reliance on such a consensus would appear at first glance to be more likely to slow down the pace of change in this context than would relying on the

[117] See note 151 below.
[118] See pp 00.
[119] Concurring Opinions of Judge Mahoney, Joined by Judges Tsotsoria and Vehabović.

general European consensus but, perhaps paradoxically, so doing might encourage the Court to take a more proactive approach since any underlying concerns judges might have as to the reception of their judgments in certain states might be allayed to an extent. Placing some emphasis on the consensus on this issue in broadly comparable states, as opposed to discerning one in a single state, would foster a gradualist approach to eroding discrimination against same sex couples in a number of member states, as considered further below.[120] So doing could also aid in avoiding the perception that the Court in the particularly sensitive social context of requiring the introduction of same sex registered partnerships could merely rely on a consensus to impose 'Western' human rights' standards on Central and Eastern European member states.[121] In general, clearly, the Court should give the ECHR the same 'meaning' in all 47 member states, but the malleability of consensus analysis enhances the fluidity of its 'meaning' or scope in relation to positive obligations.

Disregarding the discriminatory dimension of the claim

It is significant that the Court declined to decide *Oliari* separately under Article 14 read with 8.[122] Had it done so, the two factors it identified as related to the demands of respecting the family life of same sex couples would have been found to be irrelevant under Article 14, bearing in mind that no justification was put forward for the differentiation created in the circumstances between same sex and different sex couples in terms of official recognition and protection for their relationships. Given the findings on the European and global consensus, it would have appeared that weighty reasons would probably have been required to create such justification, which could not have been put forward. But the Court avoided that result by refusing to accord any role to Article 14 – which also allowed it to avoid deciding whether the absence of a specific legal framework amounted to direct or indirect discrimination on grounds of sexual orientation.

As indicated, Italy in *Oliari* refused adamantly to put forward the justification that the lack of protection for same sex unions was based on the need to protect 'traditional' marriage; its

[120] See pp00.
[121] That argument was used in the Ukraine Parliament in 2015 to avoid outlawing discrimination on grounds of sexual orientation in employment: see note 140 below. See further L. Mällesoo *Russian Approaches to International Law* (Oxford: OUP, 2015) esp at chaps 1.3 and 4. In other contexts the Court has precisely relied on a consensus to impose the majority's view on the minority regardless of locality: see eg *Unal Tekeli v Turkey* Application no. 29865/96 judgment of 16 Nov 2004 at [54] and [61].
[122] See *Oliari and others v Italy* ECtHR 21 July 2015 at [188].

stance stands in strong contrast to that of a number of states which, as mentioned, have recently introduced into their constitutions measures clearly aimed at rendering state recognition of same sex marriage unconstitutional,[123] in some instances linked expressly to protection of marriage and the family.[124] If a case analogous to *Oliari* arises in future, but the state argues that non-introduction of a registered partnerships scheme covering same sex couples is needed in order to protect 'traditional' families,[125] as Greece argued in *Vallianatos,* it would *not* need to be shown that such non-introduction was strictly necessary to achieve that end,[126] assuming that the Court again refused to consider Article 14 read with 8. While that argument would be unable to sustain intensive scrutiny under Article 14, it has in effect been allowed instead in *Oliari* (although the Court could incorporate that test into its reasoning under Article 8 in future) to narrow the scope of Article 8(1).

Implications for member states lacking a specific legal framework for same sex unions

Possible disincentives affecting some potential Central and Eastern European applicants

The decisions in *Schalk and Kopf* and *Oliari* are not of the most crucial significance for Western European states[127] since all such states already provide, or are about to provide, a specific statutory framework in the form of registered partnerships and/or marriage for same sex couples.[128] So far, no claim broadly analogous to those in *Schalk and Kopf*, *Oliari* or *Vallianatos* has been brought from any Central or Eastern European state providing no specific framework creating protection for same sex unions,[129] even from the less socially

[123] See note 159.
[124] In a number of instances, as in the Constitutions of Montenegro (Arts 71 and 72) and Lithuania (Art 38), the section referring to marriage as the union of a man and a woman is linked to guarantees as to special protection for families.
[125] The idea that introducing same sex registered partnerships threatens 'traditional families' is often deployed by religiously-based pressure groups in Central and Eastern Europe, and appears to have purchase in some legislatures: see A. Bodnar and A. Sledzinska-Simon 'Between Recognition and Homophobia: Same-Sex Couples in Eastern Europe' in D. Gallo, L. Paladini, P. Pustorino (eds) *Same-Sex Couples before National, Supranational and International Jurisdictions* (Springer, 2014) Chap 9; see also *Karner v Austria* (note 83) at [40], and note 142.
[126] See pp 00 above.
[127] They are of significance in relation to differences between marriage and registered partnerships in different member states, which would also be of relevance if a couple moved from one Western member state to another; see pp 00 above. In certain cases registered partnerships may confer the full set of rights and duties applicable to the institution of marriage and thus are equal to marriage in terms of protection, but not in respect of recognition, as, for example, in Malta.
[128] See notes 149 and 151.
[129] See pp 00. The decision in *Kozak v Poland* (note 83) is significant but only referred to housing tenancy rights. Similarly in the important decision in *Pajić v Croatia* (application no. 68453/13, judgment of 23.2.16)

conservative ones. But unless a successful application based on *Oliari* is brought from such a state some years in the future, it will not directly come into confrontation with the ECHR enforcement mechanisms, such as they are, if it disregards the decision in *Oliari*.[130] There are a range of reasons why such an application is in any event at present fairly unlikely from the more socially conservative member states (although clearly it cannot be ruled out), and if brought might fail. *Oliari* affirms an already discernible tendency in the Court's judgments – to depart via European consensus analysis from the principle of upholding core standards uniformly across Europe. But, as discussed, *Oliari* went further: in speaking of the discordance between social and legal reality in Italy, the Court was clearly referring to the established acceptance of same sex unions in that particular state. Such a discordance would be unlikely to be discerned in a number of Central and Eastern European states where it would be much harder for a same sex partnership to live openly as a couple, and where a much higher percentage of the population is opposed to recognition of same sex unions than in Italy. Further, the higher courts in certain of such states would be less likely to call for the introduction of registered partnerships for same sex couples.[131]

If an application was brought in the near future against a state in which the first (internal consensus) or both of the factors identified in *Oliari* was *not* present, then the Court would, it appears, be prepared to take a more sympathetic stance towards arguments being advanced by the state as to the scope of positive obligations required to demonstrate 'respect for family life', meaning that a breach of Article 8 would be less likely to be found. A same sex couple considering bringing an application from such a state, but aware that the factors referred to in *Oliari* would not apply in that state, might therefore be deterred from proceeding since they would anticipate that an application would probably prove futile.[132]

Even if the decision in *Oliari* had been less equivocal, the chances that a same sex couple would bring an application on a similar basis from certain especially socially conservative

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the Court found that sexual orientation discrimination in immigration law preventing family reunification of a same sex couple violates Article 8 read with 14. Obviously a claim *expressly* based on *Oliari* could not arise yet from such a state, given that only 8 months has elapsed since that decision.

[130] A member state is expected under Articles 1 and 13 ECHR to ensure that its laws and practices are in conformity with the ECHR, regardless of whether an adverse judgment is handed down against that state. That requirement is also reflected in the principle of subsidiarity. Under Article 46 a state is bound by final decisions against itself. But see note 6 above as to practice in reality on implementation of rulings.

[131] See the example in note 152 below as regards the Polish higher courts.

[132] But even if such a claim was not brought or failed, a same sex couple could seek to rely instead on *Schalk and Kopf* (note 46), which did *not* refer to the factors in question, to claim at least some state protection for their relationship as constituting a form of 'family life'.

member states particularly opposed to recognition of homosexual rights, are low. If Strasbourg's reluctance to declare a clear ECHR right to a registered partnership was due to the reception such a declaration might have in some member states if applications from them were encouraged, it appears to have failed to take account of the reality of the situation of same sex couples in a number of Central and Eastern European states, most notably Azerbaijan, Turkey, Armenia, Ukraine or Russia.[133] In such states, or parts of them, same sex couples are very likely to prefer not to live openly as a couple but as apparent flatmates or merely as friends due to the hostility and intimidation they would otherwise tend to face,[134] possibly even including 'honour' murder.[135] A future application based on *Oliari* would therefore be highly unlikely in such states; applicants might need to rely on anonymity or seek asylum elsewhere in Europe,[136] but clearly in such a climate safety and security would

[133] They appear to be the states in which opposition to recognition of same sex unions is most firmly entrenched: around 85 percent of adult Russians said they were strongly against a law that would allow same-sex marriage, the Levada Public Opinion Centre reported in 2013 ('Vast majority of Russians oppose gay marriage and gay pride events – poll' *Russia Today*, 12 Mar 2013 at *https://www.rt.com/politics/most-russians-oppose-gay-marriage-and-gay-pride-events-poll-140/*). As reported on 13 May 2015 the Gender and Women's Studies Research Center at Kadir Has University in Istanbul had surveyed a thousand people across 26 cities and found that while attitudes towards LGBT rights were steadily improving, 60% of those surveyed said that same-sex relationships were unacceptable 'Social Gender and Women Perception in Turkey' cited in 'Gender inequality remains high in Turkey, according to study' *Daily Sabah*, 13 May 2015 at http://www.dailysabah.com/nation/2015/05/12/gender-inequality-remains-high-in-turkey-according-to-study.
The Pew Research Centre found in 2013 that 92% of the Muslim population in Azerbaijan viewed homosexual behaviour as 'morally wrong' (Pew Forum 'The world's Muslims: religion politics and society' 30 April 2013, chapter 3, at http://www.pewforum.org/2013/04/30/the-worlds-muslims-religion-politics-society-morality/). A 2010 Gorshenin Institute poll found that the Ukrainian attitude to sexual minorities was 'entirely negative' for 57.5%, 'rather negative' for 14.5% (cited in 'Ukraine takes aim at "Gay Propaganda"' BBC, 11 October 2012, at http://www.bbc.co.uk/news/magazine-19881905); see also A. Kravchuk and O. Zinchenkov 'On the Threshold' Nash Mir Center Council of LGBT Organizations of Ukraine, 2013. See also notes 18 and 134.

[134] In the 2011 World Values Survey, 84% of Turkish respondents stated that they did not want to live with LGBT neighbours (see http://www.worldvaluessurvey.org/WVSDocumentationWV6.jsp). A 2013 survey by the Pew Research Centre found that 74% of Russians said homosexuality should not be accepted by society 'Russia's anti-gay laws in line with public's views on homosexuality,' August 5 2013; the Russian Public Opinion Research Centre (VCIOM) found that 51% of the population would not want to live nearby or work with a gay person 'under any circumstances,' 11 June 2013 (see for press report http://www.wciom.com/index.php?id=61&uid=830). Photographer Tatiana Vinogradova found in 2015: 'In Russia, only 1% of the gay population dares to live openly. That is why the general mood in my work is dark and melancholic' (CNN 30 September 2015). See also 'Human Rights Violations of Lesbian, Gay, Bisexual, and Transgender (LGBT) People in Armenia: A Shadow Report' submitted for consideration at the 105th Session of the UN Human Rights Committee July 2012, Geneva. Human Rights Watch found that LGBT rights activists 'have expressed concern for the alarming level of homophobia in Armenia' ('World Report 2014 on Armenia').

[135] See BBC News 15 September 2011 concerning Babi Badalov, a gay artist from Azerbaijan who was given asylum in France because of such a threat on grounds of his sexual orientation in his home country.

[136] See eg *Oganezova v Armenia* (2013), an application to Strasbourg that appears to have been discontinued. It concerned the positive obligations placed on states regarding hate crimes on the basis of sexual orientation; the applicant, a member of the LGBT community who ran a night club in Armenia frequented by that community, was bringing the claim under Articles 3, 8, 10 and 14 against Armenia for failing to prevent attacks on her and for subsequently failing to investigate, prosecute and punish the perpetrators of the hate crimes committed against her (see Interights report: http://www.interights.org/oganezova-v-armenia/index.html). There was an

not lie in seeking open, official acknowledgement of the relationship, rendering unavailing any application based on *Oliari* in practice, even if it was successful. Clearly, however, this basis for non-disturbance of the refusal to provide for forms of registered partnership in such states relates to sustained and extreme discrimination against a minority, a matter that the ECHR was devised originally to address.[137]

Combatting discrimination against same sex partners in Central and Eastern Europe

The stance of states towards same sex couples in Central and Eastern Europe is, clearly, far from uniform in accordance with their differing cultural and religious traditions,[138] and in some states action to combat discrimination based on sexual orientation is currently evident, bolstered by findings from the Council of Europe, Reports to the UN or from activist human rights groups,[139] and by the need to deepen ties with the European Union.[140] Thus, clearly, any concerns the Court has as to the reception of findings in favour of a specific legal framework for same sex unions under the ECHR, do *not* relate with equal force to the various states in question, as the following discussion demonstrates. The Czech Republic and

escalation in the number and intensity of attacks until she finally left Armenia for Sweden, where she is currently seeking asylum.

[137] The treatment of Jews in Nazi Germany based on a concept of state sovereignty untrammelled by outside intervention led to the inception of the ECHR, founded centrally on rejection of the idea that adverse treatment of minorities is a matter for a state to judge for itself. Clearly, its jurisprudence has had, or has sought to have, a very significant impact on sexual orientation discrimination in *general* – see: *Dudgeon v UK* (1982) 4 *EHRR* 149; *L and V v Austria* (2003) 36 *EHRR* 55; *Smith and Grady v UK* (1999) 29 *EHRR* 493; *Alexeyev v Russia* ECtHR 21 October 2010; *Bączkowski and Others v Poland* (2009) 48 *EHRR* 19.

[138] See further on registered partnerships in Eastern European states: M. Jagielski 'Eastern European Countries, from penalisation to Cohabitation and further?' in K. Boele-Woelki and A. Fuchs (eds) *Legal Recognition of same sex couples in Europe: National, Cross-border and European Perspective* (Intersentia, 2012).

[139] See UN Human Rights Office Report (OHCHR) (A/HRC/29/23) 2015; see eg the report by Human Rights Watch: 'Violence and Harassment against LGBT People and Activists in Russia' 15 December 2014: https://www.hrw.org/report/2014/12/15/license-harm/violence-and-harassment-against-lgbt-people-and-activists-russia.

[140] During the period when states are seeking to join the EU (which to date have included as candidates who were successful in doing so Hungary, Estonia, Latvia, Romania, Poland, Lithuania, the Czech Republic, the Slovak Republic), they have to show adherence to the so-called Copenhagen criteria: http://ec.europa.eu/enlargement/policy/conditions-membership/index_en.htm. They were laid down at the June 1993 European Council in Copenhagen, Denmark; membership requires that the candidate country *inter alia* has achieved stability of institutions guaranteeing democracy, the rule of law, human rights, respect for and protection of minorities. For example, Albania was confirmed as a candidate in June 2014; a European Commission Progress Report (COM(2014)700 final of 8.10.2014) found that some steps had been taken to improve the legal recognition of the rights of lesbian, gay, bisexual, transgender and intersex persons. If candidates for EU membership fail to attain a certain level of protection for such rights, their path towards membership will be blocked, as occurred when Ukraine's Parliament failed to pass a Bill in November 2015 providing *inter alia* protection against sexually oriented discrimination in employment, intended to aid in enabling EU membership: see M Tucker 'Anti-gay vote dashes Ukraine's EU hopes', *The Times* 12 November 2015.

Hungary already have registered partnership schemes for same sex couples,[141] as does Slovenia, which also passed a same sex marriage Bill in 2015, the first post-Communist state to do so.[142] Croatia's Parliament passed a law allowing civil partnerships for same sex couples in 2014, as did Estonia, also in 2014, by enacting the Registered Partnership Act, which came into force in 2016. In 2012 a registered partnership Bill was submitted to the Slovakian Parliament but was not passed; however, public opposition to recognition of same sex unions appears to be weakening.[143] In 2015 a Bill was put forward in Latvia to modify the Civil Code to provide for registered partnerships.[144] The proposed law would have allowed 'any two persons' to register their partnership and thereby they would have acquired almost the same rights and obligations as married couples, but the proposal was rejected.[145] Bulgaria considered adding different sex and same sex couples to its Family Code in 2012 but has not so far done so. A package of proposed constitutional reforms is currently before the Ukrainian parliament and includes a proposal for same sex unions,[146] but the proposal is opposed by the All-Ukrainian Council of Churches and Religious Organizations. In 2015 the Legal Committee of the Romanian Chamber of Deputies considered a legislative proposal aimed at legalizing same sex registered partnerships, the third proposal of that kind introduced in less than three years, but it was rejected. Three draft laws on gender neutral registered partnerships have been considered so far in the Polish legislature, but none have yet been passed into law.[147]

As the Court pointed out in both *Vallianatos* and *Oliari,* the European consensus – in the sense of taking account of the introduction of same sex registered partnerships in member

[141] The same sex registered partnership law in the Czech Republic came into effect on 1 July 2006, the Hungarian Act on Registered Partnership on 1 July 2009.
[142] The Slovenian Parliament passed a law in March 2015 affording same-sex couples the right to marry and adopt children but the measures have not been enforced yet since a civil society group backed by the Catholic Church called 'Children Are At Stake' brought a challenge to it to Slovenia's highest court. The Court agreed with the challenge, overturning the law, and deciding that the measure must be the subject of a referendum; the Parliament decided (on 4 November 2015) that it would occur on December 20 2015: http://news.yahoo.com/slovenia-hold-referendum-same-sex-marriage-154822887.html.
[143] A 2015 referendum intended to lead to strengthening the constitutional ban on same-sex marriage and same-sex adoption in the Slovak Republic was declared invalid after only just over 20 percent of voters responded: 7 February 2015: http://www.hurriyetdailynews.com/slovak-vote-on-gay-marriage-adoption-ban-a-flop-.aspx?pageID=238&nID=78044&NewsCatID=351.
[144] The Bill was put forward on 30 January 2015 by Veiko Spolītis, a Member of Parliament for Straujuma's Unity party.
[145] By the Legal Affairs Committee on 24 February 2015: *Latvijas Sabiedriskie mediji*.
[146] As reported on 20 September 2015.
[147] As reported on 19 December 2014 at the latest attempt 185 MPs voted for the bill, with 235 against, and 18 abstentions.

states - is currently strengthening.[148] Although, as discussed, the decisions in question, especially *Oliari*, are somewhat unclear as to the precise role consensus analysis linked to the margin of appreciation played in them, they do indicate that as the consensus on this matter in Europe strengthens,[149] the margin of appreciation accorded to individual states will narrow as to implementing their positive obligations under Article 8.[150] Given that post-*Oliari* the introduction of same sex marriage/registered partnerships will continue to grow in Europe,[151] and states that have introduced them will be in a clearer majority by 2017, it would be expected that the Court's analysis of the consensus would change in future, meaning that it would be prepared to find that the margin of appreciation accorded to states which have not introduced registered partnerships has narrowed. However, since Italy's argument based on its margin under Article 8(2) was rejected in *Oliari*, and Article 14 was not considered, the decision as to Article 8 partly turned on the requirements of 'respect' for private and family life which, as discussed, were found to relate to the existence of the factors identified in a particular state. Arguably, the Court therefore created some latitude for itself to avoid finding a breach of Article 8 in future even after a greater convergence of standards on this issue in Europe has occurred, possibly with a view to debarring consensus analysis from performing its expected role where opposition might be anticipated to future decisions on this matter. But it is eventually likely to become problematic for the Court to sustain that position as the consensus in Europe continues to strengthen, and given that the lack of state protection and

[148] See text to note 110 above.

[149] Belgium, Denmark, France, Iceland, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden and the United Kingdom recognise same-sex marriage. See note 151 for states that are about to introduce same sex marriage. For a list of states authorising some form of civil partnership for same-sex couples see note 110. As noted above, in 24 member states there is legislation permitting same-sex couples to have their relationship recognised as a legal marriage or as a form of civil union/ registered partnership, and that number is about to increase: see note 151.

[150] *Oliari and others v Italy* ECtHR 21 July 2015 [162].

[151] The number of states to have introduced same sex marriage or registered partnerships is about to increase: in Ireland, after a referendum to alter the constitutional definition of marriage to encompass same sex unions, a Bill to implement the revised definition so as to legalise gay marriage in Ireland was submitted on 23 September 2015. A German Bill on gay marriage had its second reading on 25 September 2015 and was approved by the Bundesrat. Finland's Parliament approved a same sex marriage measure in 2014 which will come into force in 2017. The Greek government announced on June 10, 2015, that it will introduce a new law giving civil union rights to same-sex couples following *Vallianatos* (note 75). Slovenia may introduce a same-sex marriage law in 2016 (see note 142 above); in 2015 Greenland's Parliament approved a same-sex marriage law by a unanimous vote 27-0 (the law came into force on 1 October 2015). A fifth attempt to make gay marriage legal in Northern Ireland occurred in the region's parliament, on 2 Nov 2015; it was passed by a small majority but the DUP used a Parliamentary veto – 'a petition of concern' – to block subsequent legislation. Cyprus introduced a Bill allowing for same sex civil partnerships which gained the approval of the Cabinet in May 2015; it has now passed to the Parliament where it will be voted on; Estonia's Registered Partnership Act came into force in 2016. A civil union bill covering same sex and different sex partners was presented to the Italian Parliament on 14 October 2015 as a response to *Oliari*, which passed the Senate in a watered-down version (excluding certain parental rights of non-biological parents in same-sex unions) on 25.2.2016. A final vote is expected in April 2016.

recognition of same sex relationships relates to an especially intimate aspect of family life. In a state in which there is no discordance between social reality and the law since both are equally affected by a climate of homophobia, the risk of acquiescing in such a climate would be expected to lead the Court eventually to rely on the strengthened European consensus (including in some broadly comparable Central or Eastern states) and refuse to take the internal consensus in question into account, thereby according the state a fairly narrow margin of appreciation only.

Moving towards a clear Article 8 and 14 right to a same sex registered partnership

If the Court accepted the approach described in respect of future applications it would therefore obviously also have a role in ensuring that a stronger European consensus on this matter becomes apparent in future. If an application was brought against a Central or Eastern European state, and the *Oliari* factors were not accorded significance,[152] the Court would clearly be more likely to find a breach of Article 8, which would, assuming that the state in question implemented the ruling, then aid in influencing the consensus in Europe and thus the Court's analysis in future cases. Taking a firmer line at Strasbourg on this matter might mean that due to their obligations under Articles 1 and 13 ECHR,[153] the less socially conservative Central or Eastern European states, such as Lithuania, where a debate on this issue is currently occurring,[154] might become more receptive to reviewing the lack of provision of same sex registered partnerships in their own states, prior to any possible adverse ruling at Strasbourg on this matter that they might otherwise face in future. Resulting internal reviews as to ECHR-compliance in such states would in themselves have an educative, liberalising impact in terms of prompting debate, and would encourage the activity of LGBT activist groups. Further, the bars in the Constitutions of a number of states on same sex marriage are usually, not invariably, accompanied by provisions on non-discrimination, which, if

[152] The mismatch between social reality and law found in Italy in *Oliari* is not as apparent in a number of Central and Eastern European states (see notes 133 and 134). In Poland, for example, an Opinion poll by the Polish Centre for Public Opinion Research (CBOS) in 2013 found 65% of the Polish people opposed to the introduction of registered partnerships and 33% in favour. Also the Polish Constitutional Court's position on civil partnerships is not as favourable to their introduction as was that of the Italian Supreme Court (at http://www.cbos.pl/EN/publications/publications.php). The Polish High Court has given its opinion that all the draft Bills on registered partnership were unconstitutional, since Article 18 of the Constitution protects marriage (30 January 2013); see 'Information paper on LGBTI discrimination for The European Commission Against Racism and Intolerance' April 2014 at http://ptpa.org.pl/public/files/LGBT_Raport%20FINAL.pdf.

[153] See note 130 as to the effect of Articles 1 and 13 ECHR.

[154] See The Human Rights Monitoring Institute 'After *Oliari* partnership debate in Lithuania gets serious,' 2015, at https://www.hrmi.lt/en/new/1044/.

interpreted in future by domestic courts by reference to the developing Strasbourg jurisprudence, could be found to mandate the introduction of same sex registered partnerships to avoid creating discrimination based straightforwardly on sexual orientation.[155]

The decision in *Vallianatos* could also lead to Strasbourg applications relating to the exclusion of same sex couples from an *existing* registered partnerships scheme since the two key factors identified *Oliari* would not need to be present. Such applications are likely to be rare since when states introduce alternatives to marriage that is usually to provide rights to same-sex couples. Lithuania, however, provides an example of a state in which *Vallianatos* could be relevant in future. It considered a registered partnership Bill in 2015; a number of members of the government were opposed, however, to including same sex couples in the legislation,[156] and it was partly due to concern that they would eventually have to be included that the Bill was dropped. If it was reintroduced, but same sex couples were excluded, the *Vallianatos* principle would apply, regardless of finding a discordance in Lithuania between social reality and the law in terms of the lived experience of same sex couples, a discordance that probably would not be apparent.[157] Lithuanian same sex couples considering taking applications to Strasbourg would therefore be encouraged to do so, and that would obviously

[155] For example, in 2009 the Slovenian Constitutional Court found that Article 22 of the Registration of Same Sex Partnerships Act (RSSPA) violated the right to non-discrimination under Article 14 of the Constitution on the ground of sexual orientation, and required that the legislature remedy the established inconsistency within six months: U-I-425/06. While Poland's Constitution bars same sex marriage, its Constitutional provisions on non-discrimination arguably mandate the introduction of a civil partnership law. The Bosnian Constitution (Article II) protects the human rights and fundamental freedoms it lists by defining them through the 'Enumeration of Rights' (Article II 3), stating that the enjoyment of the rights and freedoms is secured to all persons in Bosnia and Herzegovina without discrimination on any grounds ('Non-Discrimination', Article II, 4), and states that the ECHR has supremacy over all other law in Bosnia and Herzegovina. In contrast, the Moldovan Constitution, Article 16 of which protects 'Equality', does not protect it on the ground of sexual orientation. While that is not conclusive, it has influenced the lack of protection on this ground: see 'Study on Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity Legal Report: Moldova' by independent researcher Vera Turcanu-Spatari. The study finds: The overall legal framework of the Republic of Moldova does not define the terms of discrimination, sexual orientation and gender identity; and it does not provide mechanisms of redressing discrimination. The Georgian Constitution also does not provide express protection against discrimination on that ground (Art 14) but it does not specify that marriage must be between a man and a woman. The Ukraine Constitution also does not provide such protection (Art 24) and defines marriage as between a man and a woman (Art 51).

[156] That includes the Justice Minister: see Human Rights Watch 'Letter to the Lithuanian Minister of Justice Regarding Equal Rights in Relationship Legislation', 11 June 2015; that is apparently not on the basis that the legislation is intended only to protect traditional families, but on the basis that the government considers that same sex couples would be such a tiny minority that a new framework is not needed: https://www.hrw.org/news/2015/06/10/human-rights-watch-letter-lithuanian-minister-justice-regarding-equal-rights.

[157] An EU-wide survey conducted by the EU Agency of Fundamental Rights in 2013 revealed that 61 percent of Lithuanian LGBT people who participated in the survey felt discriminated against or harassed in the last 12 months because of their sexual orientation. See also the Pew Research Global Attitudes Project 4 June 2013 on homophobia in Lithuania, at https://euobserver.com/beyond-brussels/129197.

also apply to any other states introducing a registered partnership scheme in future reserved for different sex couples. But the other factors discouraging such couples from taking applications to Strasbourg might still tend to apply.

Preserving the Court's authority and legitimacy?

Had the Court in this jurisprudence found in favour of declaring that Article 12 read with 14 or alone would be breached if same sex couples were excluded from the right to marry, it would have been likely to face very strong opposition to its stance in most Central and Eastern European states.[158] Its stance on same sex marriage, as opposed to registered partnerships, is arguably strategically understandable at the present time when a number of states have taken the step of enshrining their opposition to same sex marriage in recent amendments to their Constitutions.[159] It is possible that, although the Court has previously ruled that the ECHR prevails over the national constitution,[160] such amendments may be having an impact on the Court's stance in the sense that they signal to it in advance that recognising a right to same sex marriage is a step it should not take at present if it is to preserve its legitimacy in a positivist sense. Aware that it faces such Constitutional barriers in some member states, and having already rejected reliance on a 'liberal' version of consensus analysis in this context, the Court may in future be tempted to react by embracing a particularly 'strict' version of such analysis whereby a clear majority of states (possibly

[158] See note 159 and text to note 142. Germany, Austria and Switzerland also do not yet allow same sex couples to marry, but there is evidence to suggest that, at least in Germany and Switzerland, the opposition would not be likely to be as strong. In Germany another same-sex marriage bill was approved by Germany's Bundesrat in September 2015, although it did not pass. The Legal Affairs Committee of the National Council, the lower house of the Swiss Federal Assembly, voted 12-2 to approve a 'marriage for all' initiative introduced by the Green Liberal Party in February 2015. On 28th February 2016 a referendum was held on a Constitutional amendment that would have changed article 14 in the Swiss constitution, providing a gender neutral right to marry, and bar same sex marriage. The respondents voted by 50.8% to 49.2% to reject the proposal, put forward by the Christian Democratic People's Party. The Austrian Assembly voted by a large majority against a proposed resolution to grant lesbian and gay couples 'the human right of equal marriage' in June 2015.

[159] Marriage is defined as a union solely between a man and a woman in the Constitutions of Bulgaria, Croatia, Hungary, Latvia, Lithuania, Moldova, Montenegro, Poland, Romania, Serbia, Slovakia and Ukraine. For example, in 2013 the Commission tasked with revising Romania's Constitution adopted an amendment describing marriage as a consensual relationship between a man and a woman only, an amendment backed by the powerful Romanian Orthodox Church. Previously, the Constitutional article only used the words 'between spouses' when referring to the marriage partners.

[160] See *United Communist Party v Turkey* (1988) 26 EHRR 121. However, the reluctance of the Court to allow the ECHR to prevail over the Irish Constitution may explain the refusal to rely on the consensus in Europe on abortion in *ABC v Ireland* (note 27). The Court's cautious approach to national constitutions does not parallel that of the US Supreme Court (see note 17 above and associated text); at least 30 US states had similar constitutional amendments, but all the remaining ones were struck down by the US Supreme Court in *Obergefell* (note 92).

including comparable states) accepting same sex marriage is needed before it is prepared to find that a ban on such marriage in a state creates a violation of Article 12 read with 14.

The Court's use of consensus analysis in relation to registered partnerships is more variable, as discussed, and obviously the consensus here is stronger. The Court demonstrated in *Schalk and Kopf, Vallianatos* and *Oliari* that it is fairly receptive to recognising an ECHR right to a registered partnership, as opposed to a right to same sex marriage, since it appears to view such partnerships as reflecting a more neutral, less culturally-specific, secularised conception of formalisation of unions. In *Schalk and Kopf, Vallianatos* and *Oliari* it was prepared to depart from a strict version of consensus analysis to take steps towards that result. States that have sought to bar the possibility of introduction of same sex marriage in future, legislatively or via their Constitutions, are likely to accept that such bars do not preclude the introduction of registered partnerships,[161] although to varying degrees a number of such states demonstrate little or no acceptance that recognition of such partnerships would be desirable.[162] The Court is aware of the opposition to such partnerships in a number of states, and in *Oliari* it is argued that the Court was seeking to preserve its own legitimacy in addressing this issue; if it takes decisions that a number of member states clearly or almost certainly will not implement,[163] the fragile consensus currently surrounding the Court's decisions in parts of Europe – the respect for its authority - will tend to be undermined. (Clearly, a state strongly opposed to judgments of the Court in this context could denounce the ECHR and withdraw from it, under Article 58. But it is far more probable – and more insidiously dangerous to the Court's authority - that a disaffected state would stay within the Convention system but evince hostility and resistance to the decisions.)

Had a right to a registered partnership been declared in a less equivocal fashion in *Oliari*, same sex couples from some member states, although probably not the most socially conservative ones, for the reasons given above, might have been more likely to bring

[161] For example, in 2015 a Bill to legalize same-sex civil unions in Lithuania was found by a parliamentary committee *not* to breach the country's Constitution, which defines marriage as only being between two people of different genders.
[162] See pp 00.
[163] Eg Human Rights Watch argued that Azerbaijan's 'systematic crackdown on human rights defenders and other perceived government critics shows "sheer contempt" for its commitments to the Council of Europe' HRW 'Azerbaijan: Government Repression Tarnishes Chairmanship' 29 September 2014, at https://www.hrw.org/news/2014/09/29/azerbaijan-government-repression-tarnishes-chairmanship. *The Economist* found in 2013 that the 'Council of Europe's credibility is being undermined given Azerbaijan's poor record on political prisoners': 'Azerbaijan and the Council of Europe' 22 May 2013. See also note 6 above

applications in future successfully challenging the lack of any provision for the recognition of same sex unions in their countries. If the state in question had then failed to implement the ruling, which might have been probable, the Court's legitimacy in positivist terms would have been undermined further than it already has been by long drawn out procrastination and resistance to implementing its rulings in certain member states, such as Russia.[164] So even in relation to same sex registered partnerships, which are less likely to be Constitutionally barred,[165] it is argued that the Court's manipulation of the consensus doctrine is being deployed at present to seek to avoid confrontations with a number of Central and Eastern European states.

But partial dependence on majoritarianism in a single member state as in *Oliari* exacerbates the danger that reliance on the consensus doctrine in general creates - that the Court is not fully satisfying its duty as a standards-setter in combatting discrimination on grounds of sexual orientation. It can hardly be questioned that discrimination against same sex unions is perpetuated by certain religions; if religious views are allowed to influence legislative decisions, as in, for example, Russia, where the Russian Orthodox Church is highly influential and openly strongly opposed to recognition of homosexual rights,[166] then the state has allowed the view that a group of citizens are not entitled to equal concern and respect to influence policy. If the Strasbourg Court in effect fails to combat that view it has refused to follow a central tenet of liberalism, and has damaged its legitimacy in normative terms by departing from one of its own founding principles – to prevent the oppression of minority groups in member states.[167]

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[164] See note 6 above. Obviously the failure to implement *Hirst v UK* [2005] ECHR 681 has also contributed strongly to that effect.

[165] See note 161.

[166] Here is a representative statement: 'The Orthodox marriage is different from the Protestant marriage, or that of the "Western" type….The Orthodox marriage is a Mystery, that is, it is one of the Mysteries of the Orthodox Church, alongside Baptism, Communion, etc. For this reason it is not those entering into matrimony who perform the Mystery…but it is God Himself Who performs it… The Orthodox marriage is a union of grace, blessed by God, while the Protestant or civil marriage is an action taken by mortals, and for this reason is without grace… And although the Orthodox Church sternly denounces the "gays," for instance, in the official statement adopted by the latest Pastoral Conference of the Western American Diocese of the Russian Orthodox Church Outside of Russia, held on March 10-12, the Orthodox Church has nothing to do with homosexual marriages, strictly speaking: there is nothing unusual about the godless acting in a depraved manner' (Priest Sergei Sveshnikov 'Opinion on same sex marriage' 2006, at http://www.russianorthodoxchurch.ws/01newstucture/pagesen/articles/samesex.html).

[167] The Court has stated that it has taken the position that: 'democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position': *Baczkowski and others v Poland* ECtHR 3 May 2007, at [63].

It may therefore readily be argued that the Court should, post-*Oliari*, bearing in mind the currently strengthening consensus on the issue, take a bolder, less equivocal stance on same sex registered partnerships. So doing clearly might encourage further applications but might also tend to embolden activists and others in certain Central and Eastern European states, who would therefore be able to bring more effective pressure to bear on their respective governments.[168] Taking a firmer stance at Strasbourg would also enhance the Court's role in counteracting the pressure on some of those states, in some instances emanating from Russia, and based on the idea of promoting traditional Russian values as opposed to Western liberalism, to maintain a general climate of homophobia evidenced by, in particular, passing or seeking to pass 'gay propaganda' laws,[169] banning or failing to protect Pride parades or gay rights' demonstrations. Clearly, such manifestations have themselves been directly addressed by the Court in a number of decisions,[170] but sending out a clearer signal as to the non-acceptability of continuing to exclude same sex couples from specific frameworks recognising their relationships could also contribute to a diminution in social acceptance of homophobic laws and practices. In turn, receptivity to the Court's judgments in favour of such recognition might be enhanced in some of the states in question, thus diminishing the risk of undermining its authority and legitimacy arising when such judgments are met with resistance.

Conclusions

This article has found that the Court is currently opposed to declaring an ECHR right to same sex marriage: it is showing acceptance of the exclusion of same sex couples from the ability in practice to access the guarantee under Article 12 in a number of member states, and is at present far from producing a European equivalent of *Obergefell*. Given that currently not even a thin majority of member states have introduced such marriage, its reliance on one version of consensus analysis to take that stance is defensible: a degree of self-restraint based partly on such analysis allows the Court to maintain its legitimacy in positivist terms. But in

[168] Eg Organization Q in Bosnia and Herzegovina, a state that does not give official recognition to same sex partnerships.

[169] Such a law is currently in place in Russia, and appears to have influenced attempts, which have not so far been successful, in 2013 and 2014, to spread similar laws beyond Russia in, for example, Latvia, Lithuania and Moldova. See P. Johnson '"Homosexual propaganda" laws in the Russian Federation: are they in violation of the European Convention on Human Rights?' (2015) 3(2) *Russian Law Journal* 37.

[170] See eg: *Genderdoc-M v Moldova* ECtHR 12 June 2012; *Identoba and others v Georgia* ECtHR 12 May 2015. See also the decision in *Alexeyev v Russia* (note 137) with which Russia has refused to comply.

taking this stance the Court is opposing a number of core Convention values: in particular, weighty reasons have not been found to be needed to justify differentiation based on sexual orientation under Article 12 read with 14.[171] The use of the consensus doctrine has therefore clearly allowed states which institutionalise and condone discrimination against same sex partners to have an impact on the Court's jurisprudence, and therefore by extension on states potentially less unreceptive to the introduction of same sex marriage.[172] Thus its stance on such marriage neatly encapsulates its struggle to maintain a balance between preserving its legitimacy as on the one hand the guardian of core Convention values, and on the other, in positivist terms, as a credible and authoritative Court whose judgments are not disregarded. Once a thin majority of member states have introduced same sex marriage, the Court may revert to reliance on a *stricter* model of consensus analysis to continue to exclude same sex couples from the scope of Article 12, but so doing will make it harder to resist the impression that the Court is merely condoning or disregarding persistent discrimination against a sexual minority.

The struggle to create a reconciliation between those two aspects of its legitimacy is also apparent in its jurisprudence on same sex registered partnerships, but to a lesser degree, as is the damage done to the procedural integrity, persuasive power and quality of reasoning in its judgments, due to its non-transparent and somewhat arbitrary use of varying models of consensus analysis, and the unreasoned diminution or negation of the role of Article 14. This article has sought to demonstrate that the device it has relied on to achieve that reconciliation in *Oliari* – taking account of a consensus on such partnerships within a single state – is unable to accomplish that task since it represents a model of consensus analysis most susceptible to perpetuating discrimination against same sex couples. In general, its use of consensus analysis in this context reveals that the Court, on policy grounds, is tending to seek to obscure its hesitancy in confronting such discrimination when perpetuated by certain member states. It has therefore been argued that in this sensitive social context reliance on an internal consensus should be rejected in favour of a search for a consensus within broadly

[171] The current lack of a demand for such reasons in relation to Articles 12 and 14 parallels the previous approach in the general context of addressing discrimination on grounds of sexual orientation under Article 8 of failing to demand such reasons, after a violation was first found on that ground in *Dudgeon v UK* (1982) 4 *EHRR* 149, in a number of instances of inadmissibility decisions between 1982 to 1997: see eg *S v UK* Commission decision 14 May 1986.

[172] Such as Malta, which has already introduced same sex registered partnerships and recognises same sex marriages contracted abroad: http://www.timesofmalta.com/articles/view/20140420/local/Changing-times-divorce-to-legal-same-sex-marriage-in-three-years.515580.

comparable member states, but only as one aspect of a more clearly defined European consensus. So doing could foster its adoption of a gradualist role in furthering the introduction of specific frameworks covering same sex couples in member states while still maintaining its legitimacy in positivist terms. While this article acknowledges the progressive steps taken by the Court, especially in *Schalk and Kopf*, *Vallianatos* and *Oliari*, it is also calling for a more courageous stance from the Court than the one it evinced in *Oliari*, while recognising the obstacles it faces in the most socially conservative states in Central and Eastern Europe.